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TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1924.

No. 120.

UNITED STATES OF AMERICA, *Appellant,*

vs.

T. H. DUNN, N. E. DUNN, *ET AL., Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR N. E. DUNN AND T. H. DUNN, APPELLEES.

May It Please the Court:

The following undisputed facts and settled principles of law sustain the judgment dismissing the Government's bill, to-wit:

(1) That at all times from November, 1905, until September, 1914, J. J. Eaves was the duly appointed, legal and acting curator, or guardian, of the estate of Allie Daney.

(2) That A. N. Thomas, who executed the Departmental oil and gas lease to Dunn and Gillam on August 19th, 1913, covering the 40 acres involved, subject to the approval of the Secretary of the Interior, was not then the legal guardian of the person and estate of Allie Daney and did not become such guardian until September 30th, 1914. (See Defs.' Exhibit 10, Rec., p. 227.)

(3) That on August 18, 1913, acting under the order of the Love County Court, J. J. Eaves, as curator or guardian of the estate of Allie Daney, executed a Departmental oil and gas mining lease to J. S. Mullen, subject to the approval of the Secretary of the Interior, said lease covering the same 40 acres described in the A. N. Thomas lease to Dunn and Gillam, and also 90 acres additional, making in all 130 acres (Rec., p. 214).

(4) That in accordance with the rules and regulations of the Secretary of the Interior, Dunn and Gillam filed their 40-acre Thomas guardianship lease in the office of the Indian Superintendent at Muskogee, Oklahoma, on August 22, 1913. (See Exhibit A, Rec., p. 16.)

(5) That in accordance with the rules and regulations of the Secretary of the Interior Mullen filed his lease in the office of the Indian Superintendent at Muskogee on August 23, 1913 (Rec., pp. 107 and 214).

(6) That Hon. Dana H. Kelsey, United States Indian Superintendent at Muskogee, after receiving the two conflicting leases, notified Dunn and Gillam and also Mullen of the filing of the conflicting leases, whereupon counsel for each of the competitive lessees appeared and filed briefs and argued the matter, each side contending that his lease was executed by the legal guardian—that is, Dunn and Gillam were contending that Thomas was the legal guardian, and Mullen was contending that Eaves was the legal guardian or curator. (See Plaintiff's Exhibit 15, Rec., pp. 106-107.)

(7) That Kelsey, Indian Superintendent, realizing that the Interior Department had no jurisdiction to enter any binding order or judgment determining which of the two conflicting guardians was the legal guardian and thereby authorized to lease the 40 acres of land in question, advised the parties that they should make some adjustment or compromise of their claims so as to unite their interest, or one or the other withdraw; and if this was not done, both leases would be disapproved.

(8) That the contest between Mullen and Dunn and Gillam developed into a bitter fight, each party being bull-headed, more or less, during which time oil development was approaching this 40 acres.

(9) That, as testified to by Kelsey (Rec., p. 171), Mullen called on him one day and "I told him (Mullen) that the matter had dragged along about

long enough, that there seemed to be no way of determining this matter without *disapproving both contracts;* that development had proceeded to such an extent that the land would be drained, and that I thought there certainly was a middle ground somewhere where the two parties could get together, have the guardians both join in one lease *or the other,* and allow operations to proceed, then let the guardians fight among themselves as to which was the proper person to receive the royalty; that if something along this line was not done very shortly *I would recommend the disapproval of both leases,* and do whatever I could to see that the two guardians adjusted their troubles among themselves, or both of them sell the lease over again to allow operations to proceed. Mr. Mullen at that time said there was some bitter feeling between the two parties and that he doubted they could get together."

(10) That under pressure from Kelsey, Indian Superintendent, Mullen approached Dunn and Gillam for an adjustment of their differences, which finally resulted in a compromise agreement along lines suggested by Kelsey, as Kelsey testifies, to-wit; that both guardians join in one lease, or Thomas, as guardian, execute the Eaves lease to Mullen, or Eaves execute the Thomas lease to Dunn and Gillam, and submit the joint lease to the Department for approval with an assignment to a corporation to be organized and the stock divided be-

tween the parties that is between Dunn and Gillam, and Mullen.

(11) That such a corporation was organized and named the Bull Head Oil Company, at the suggestion of Kelsey, because the parties had been so bull-headed.

(12) That the capital stock of the Bull Head Oil Company was $18,000.00, to be and actually was divided as follows: $8,000.00 to Dunn and Gillam; $8,000.00 to Mullen; $1,000.00 to J. S. Dolman, attorney for Dunn and Gillam, and $1,000.00 non-voting stock to J. W. Gladney, the lessee of the 5-acre Gladney lease.

(13) That the Thomas lease to Dunn and Gillam and the Eaves lease to Mullen, being on file in Kelsey's office, Kelsey directed his oil inspector to take both leases to Ardmore where all the parties resided, *"for the purpose of allowing one of them to be joined in by the other guardian,"* as said by Kelsey in his testimony (Rec., p. 173).

(14) That on account of the fact that the Eaves lease to Mullen described 130 acres and the Thomas lease to Dunn and Gillam only described the 40 acres in controversy between the parties, the parties deemed it expedient to have Eaves join in the Thomas lease to Dunn and Gillam, instead of having Thomas join in the Eaves lease to Mullen.

(15) That but for the fact that the Mullen lease from Eaves described 130 acres, it was wholly im-

material to the parties and to Kelsey, Indian Superintendent, whether Thomas joined in the Eaves lease to Mullen, or Eaves joined in the Thomas lease to Dunn and Gillam.

(16) That when the compromise agreement was agreed upon between the parties on January 9, 1914 (Rec., p. 135), Mullen, as disclosed by Kelsey's report to the Commissioner of Indian Affairs on January 31, 1914 (Rec., pp. 106-108), "requested the Department to disapprove his lease insofar as it covers the land described in the lease to Dunn and Gillam."

(17) That Kelsey thereupon on January 31, 1914, recommended to the Secretary of the Interior the disapproval of Mullen's lease from Eaves, as curator, insofar as it covers the 40 acres involved and recommended the approval of the Thomas lease to Dunn and Gillam, it appearing, as said by Kelsey in his report, that "at the conference subsequently held, a compromise was effected, wherein J. S. Mullen, lessee in the prior lease, requested the Department to disapprove his lease insofar as it covers the land described in the lease to Dunn and Gillam. J. J. Eaves, curator of Allie Daney, has entered into the execution of the lease in favor of Dunn and Gillam, to which the County Court of LeFlore County has given its approval."

(18) That on January 28, 1914, T. H. Dunn and J. Robert Gillam executed an assignment on the De-

partmental form conveying said lease to the Bull Head Oil Company, which was approved by the Secretary of the Interior on April 7, 1914. (See Exhibit B, Rec., pp. 24-5-6.)

(19) That neither Dunn nor Gillam was or claimed to be at any time the guardian or trustee of Allie Daney, the minor.

(20) That assuming Thomas was the legal guardian, there is no showing that the consideration paid for the lease was inadequate or that Allie Daney suffered any damages on account thereof.

(21) That while the Government's appeal from the judgment of the District Court dismissing its bill was pending in the United States Circuit Court of Appeals, the Bull Head Oil Company, assignee and owner of the lease involved, entered into a compromise with the United States, acting through the Secretary of the Interior and the Attorney General of the United States, whereby the Bull Head agreed to pay and did pay to the Indian Superintendent at Muskogee for Allie Daney's account the sum of $45,000.00, and paid Mr. Ledbetter, assistant to the Attorney General, a fee of $12,500.00 (see Rec., p. 256).

Conclusions of Law.

We insist on the following points of law:

(1) That A. N. Thomas, not being the legal guardian of the estate of Allie Daney, a minor, at the time he executed the Dunn and Gillam lease on

August 19, 1913, or at any time thereafter until September 30th, 1914, and after Eaves resigned as curator and permitted Thomas to be appointed as guardian, the Thomas lease to Dunn and Gillam was absolutely null and void.

(2) That the Departmental oil and gas lease executed by J. J. Eaves, curator of Allie Daney, to J. S. Mullen, on August 18, 1913, under the order and confirmation of the County Court of Love County (Rec., pp. 211-213) was a valid and binding oil and gas mining lease subject to the approval of the Secretary of the Interior—that is to say, it was as valid and binding as possible to make under the law, the Secretary's approval being necessary to its final confirmation.

(3) That Eaves, the legal guardian or curator of Allie Daney, having, on August 18, 1913, executed a lease to Mullen on this same land duly authorized and confirmed by the County Court of Love County, the court having jurisdiction, the execution of a lease on the same land to Dunn and Gillam on the same date or any other date thereafter by a pseudo or counterfeit guardian, no matter how frauduently obtained, created no actionable wrong in favor of Allie Daney against the lessees (Dunn and Gillam) under such lease, in the absence of evidence *that she suffered some injury thereby.*

(4) That Dunn and Gillam, occupying *no fiduciary relationship* to Allie Daney, and having ob-

tained nothing from her by virtue of the Thomas lease, cannot be held to be trustees of any property or right or interest acquired by them in the Mullen lease from Eaves by virtue of having used the Thomas lease as a means of inducing Mullen to compromise whereby they obtained from Mullen, and not from Allie Daney, an interest in the lease.

(5) That the fact that Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease in no way alters the legal rights or status of the parties, it clearly appearing that the lease involved in this case never acquired any validity from its execution by Thomas, as guardian, and therefore, insofar as the rights of the parties are involved, we must treat the lease as having been executed solely by J. J. Eaves, curator of Allie Daney.

(6) That the signing and executing of the lease by J. J. Eaves, curator of Allie Daney, although the name of J. J. Eaves does not appear in the body of the lease, made it a valid lease from J. J. Eaves, curator of Allie Daney, a minor.

(7) That upon the discovery of the alleged fraud the United States had one of two remedies, to-wit: *(a)* An action in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc., or *(b)* an action for damages to recover the value of the lease at the time it was fraudulently obtained.

(8) That the plaintiff can not have both of these remedies and was required to elect which remedy it would pursue, and having elected to pursue the remedy in equity for rescission, it is bound thereby.

(9) That having elected to sue in equity for the rescission and cancellation of the lease, the compromise with the Bull Head Oil Company, the assignee and owner of the lease, condoned all fraud and extinguished the cause of action in its entirety, without regard to the doctrine of joint tort feasors and therefore left the Government with no cause of action for damages or other relief against Dunn or any of the other parties.

(10) That by the compromise of this case while pending in the Court of Appeals the appellant lost all equities in that it appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Company and certain of its stockholders whereby certain stockholders, with the consent and approval of the appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, also stockholders, were not allowed to paarticipate.

(11) That if the compromise with the Bull Head Oil Company, the assignee and owner of the lease, did not enure to the benefit of Dunn and Gillam and their wives, as stockholders, the measure of any recovery against Dunn and Gillam is the value of the

lease at the time it was executed on August 18, 1913, and full value having been paid to the Indian Superintendent and received by the Indian, there is nothing to recover in this suit.

POINT ONE.

At all times from November, 1905, until September 12, 1914, J. J. Eaves was the duly appointed, qualified, legal and acting curator or guardian of the estate of Allie Daney, and as such was the only person empowered by law to execute an oil lease on the 40 acres of land in question.

The third paragraph of plaintiff's bill (Rec., p. 3) alleges that J. J. Eaves was appointed curator of the estate of Allie Daney by the United States Court for the Southern District of the Indian Territory on or about November 8, 1905, and "that after the admission of the State of Oklahoma into the Union said curatorship cause was transferred to the County Court of Love County, Oklahoma."

In the Government's pleadings and on the trial in the lower court the only assault made upon the validity of the Eaves lease to Mullen is set forth in the third paragraph of plaintiff's bill (Rec., p. 3), as follows:

> "That said minor, Allie Daney, was born, reared and has resided practically all her life near Talihina, in that part of the central district of the Indian Territory, now embraced within

LeFlore County, Oklahoma, and that she never resided elsewhere prior to the year 1918.

That on or about November 8, 1905, the United States Court for the Southern District of the Indian Territory, sitting in probate, appointed J. J. Eaves as curator of the estate of said Allie Daney, and that after the admission of the State of Oklahoma into the Union said curatorship cause was transferred to the County Court of Love County, Oklahoma.

Plaintiff alleges that *because said minor was never a resident of the Southern District of the Indian Territory, the order appointing said J. J. Eaves curator was invalid for want of jurisdiction;* should this court not so hold, plaintiff alleges that all *authority of said J. J. Eaves as curator was terminated upon the admission of Oklahoma into the Union, because* the laws simultaneously put into force in Oklahoma, and particularly laws then in force and enacted in 1908 relative to minor Indians, did away with the office of curator and created in place thereof the office of guardian."

The above allegations constitute a plea of "confession and avoidance."

The Government's case, as made in its bill and as tried in the lower court, is this:

(1st) That Eaves' appointment as curator by the United States Court for the Southern District of the Indian Territory was void for want of jurisdiction "because said minor was never a resident of the Southern District of the Indian Territory;" and,

(2nd) That if the United States Court for the Southern District of the Indian Territory had jurisdiction, "all authority of J. J. Eaves as curator was terminated upon the admission of Oklahoma into the Union, because the laws simultaneously put into force in Oklahoma, and particularly laws then in force and enacted in 1908 relative to minor Indians, did away with the office of curator and created in place thereof the office of guardian."

If the Government has abandoned these points it has abandoned its case.

First Question:

The first question presented by the bill is the allegation that Allie Daney was never a resident of the Southern District of the Indian Territory, and therefore the order appointing Eaves curator was invalid for want of jurisdiction.

Answer One:

The records show that the land involved was in the Southern District of the Indian Territory. The land lies in Carter County, Oklahoma, and the Southern Court District of the Indian Territory comprised all of Carter County and a large part of the contiguous territory. That being true, the United States Court for the Southern District of the Indian Territory had jurisdiction to appoint a curator for Allie Daney.

—*MaHarry* v. *Eatman*, 29 Okl. 46.

Answer Two:

The record shows that Allie Daney's father, Solomon Daney, was living at all times mentioned, and it is well settled that the domicile of an infant is that of the parent from whom she took her domicile of origin, and changes only with the domicile of that parent. Her father (Rec., p. 228) filed his written waiver of right to be appointed guardian in the United States Court and asked the court to appoint Eaves guardian or curator. Solomon Daney, the father, also, on September 30, 1914 (Rec., p. 227), filed a petition in the County Court of LeFlore County asking the appointment of A. N. Thomas as guardian. She had a living father at all times mentioned.

Now, there is neither allegation nor proof that the father of Allie Daney was not domiciled in the Southern District of the Indian Territory. That the domicile of the child is controlled by that of the parent, see the following cases:

Ex parte Patterson, 166 Fed. 536;
Marks v. *Marks,* 75 Fed. 321;
Taylor v. *Jeter,* 81 Am. Dec. 202;
Hiestand v. *Kuns,* 46 Am. Dec. 481;
Lacy v. *Williams,* 27 Mo. 280;
Somerville v. *Somerville,* 5 Ves. Jr. 750, 1 A. R. C. 284;
Wheeler v. *Hollis,* 19 Tex. 522, 1 A. R. C. 359-364, and a long list of cases;
Tiffany, Persons and D. Relations, p. 292;
Rogers on Domestic Rel., Sec. 656.

These authorities lay down the rule that an infant cannot change his domicile; that upon the death of the father, the domicile follows that of the mother. Notwithstanding the separation of the husband and wife, the domicile of the father controls the domicile of the minor; the father's domicile controls the domicile of the minor, and that question is thoroughly settled by the authorities. See 1 A. R. C. 364, etc., for a long list of cases and annotations.

—*Powers* v. *Mortee,* Fed. Cases 11362, and a long list of authorities;
1 A. R. C. 364.

The jurisdiction, or rather *venue,* of the court to appoint a guardian of a minor is controlled by the domicile of the minor, *and not* by the residence of the minor.

—*Jenkins* v. *Clark,* 71 Ia. 552, 32 N. W. 504.

Woerner on Guardianship, page 80, on this question, says:

> "The residence of infants conferring the jurisdiction in the sense of these statutes means domicile, or home, as distinguished from residence, which may be temporary, or for a special purpose. The domicile of an infant is that of his father, if legitimate, or of his mother, if illegitimate, or after the father's death, or of a grand-parent or other person standing *in loco parentis.* The placing of a child by its father in the custody of a person residing in another county does not affect the child's domicile, nor the mother's right to its custody and care after

the father's death; so that after her death the jurisdiction to appoint a guardian is in the county in which she was domiciled at the time, although she had been adjudged insane before the father's death, and never declared restored. This domicile remains until the infant legally acquires another; and since the law conclusively disables infants from acting for themselves during minority, their domicile cannot be altered by their own acts before reacing majority. Hence the legal domicile of infant orphans is at the place where the father was domiciled at the time of his death, unless they have acquired a new domicile by remaining a member of the family of the mother when the mother acquires a domicile different from that of the children's father, or gain a new domicile in some way recognized as sufficient by the law. *It is the probate court of the county in which this domicile is situated that has alone the power to appoint the guardian.*"

Answer Three:

The United States Court for the Southern District of Indian Territory was a court of general jurisdiction with respect to the appointment of guardians and administrators of estates, etc., and its orders and decrees are not subject to collateral attack. The court had jurisdiction to determine the venue, frequently confused in judicial opinions with the word "jurisdiction." There is a distinction between jurisdiction of the subject-matter—the abstract subject-matter—and territorial jurisdiction. Territorial

jurisdiction means venue, sometimes denominated in decisions as *quasi*-jurisdictional questions. *Now, every court has jurisdiction to determine its own venue; otherwise it could never proceed and its judgments would be always open to collateral attack.* Every court has jurisdiction to determine its venue, and the United States Court for the Southern District had jurisdiction to determine the domicile of Allie Daney, and having passed on that question and appointed a guardian or curator, the decision of the court finding that it had venue is conclusive and binding on all the world, whether right or wrong. As said by Judge SANBORN, in *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 319:

> "Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud."

The United States Court for the Southern District had jurisdiction over the subject-matter (*Eaves* v. *Mullen*, 25 Okl. 679). Whether Allie Daney was domiciled or not within the Southern District, cannot be raised in this case.

—*Hathaway* v. *Hoffman*, 53 Okl. 72;
Baker v. *Cureton*, 49 Okl. 15;
Scott v. *Abraham*, 60 Okl. 10, 159 Pac. 270;
Johnson v. *Johnson*, 60 Okl. 206, 159 Pac. 1121;

Tucker v. *Leonard*, 76 Okl. 16, 183 Pac. 907;
Lowery v. *Parton*, 65 Okl. 232, 165 Pac. 164;
Wakeman v. *Peter*, 52 Okl. 639;
Rice v. *Theimer*, 45 Okl. 618;
Estate of Latour, (Calif.) 73 Pac. 1070;
Dungan v. *Superior Court*, 117 Am. St. Rep. 119;
Welch v. *Focht*, ... Okl. ..., L. R. A. 1918-D, 1163;
Guardianship of Danneker, (Calif.) 8 Pac. 514.

Scott v. *Abraham, supra; Hathaway* v. *Hoffman, supra,* and *Baker* v. *Cureton, supra,* are exactly in point.

The United States Court for the Southern District of Indian Territory was a court of general jurisdiction in the sense that its records import verity. A court of record which has, by statute, all the power that any court could have over a certain subject of jurisdiction, is to be regarded as to cases within that class, a court of superior jurisdiction within the rule which presumes the jurisdiction of such courts to render a particular judgment.

—*Stahl* v. *Mitchell*, 41 Minn. 325, 43 N. W. 385.

The Circuit, District and Territorial Courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term, and their judgments and decrees stand on the same footing as those rendered by state courts of

equal jurisdiction, and their authority or jurisdiction will always be presumed.

—*McCormick* v. *Sullivant*, 10 Wheat. 192, 6 L. ed. 300;

Ex parte Watkins, 3d Peters 193, 7 L. ed. 650;

Kennedy v. *Georgia St. Bk.*, 8 How. 611, 12 L. ed. 1209;

Page v. *United States*, 11 Wall. 268, 20 L. ed. 135;

Evers v. *Watson*, 156 U. S. 527, 39 L. ed. 520;

Skirving v. *National Life Ins. Co.*, 59 Fed. 742;

Livingston v. *Van Ingen*, 1 Paine 48, Fed. Cas. No. 8420;

McConnell v. *Day*, 61 Ark. 464, 33 S. W. 731;

Reed v. *Vaughan*, 15 Mo. 135, 55 Am. Dec. 133;

Turrell v. *Warren*, 25 Minn. 9.

It has never been denied that the United States Courts in the Indian Territory had jurisdiction to appoint guardians or curators for tribal minors. Section 31 of the Act of Congress approved May 2, 1900 (26 Stat. L. 81), put in force in the Indian Territory chapter 73 of Mansfield's Digest of the Statutes of Arkansas, in regard to guardians, curators and wards, and declared, in regard to the United States Court in the Indian Territory, that "said

court in the Indian Territory shall appoint guardians and *curators.*"

Then, to remove any possible doubt about the question, Congress, by an act approved April 28, 1904 (33 Stat. L. 573), declared that "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, *the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise.*"

See *MaHarry* v. *Eatman,* 29 Okl. 46.

Plaintiff's Next Contention:

Plaintiff's next contention is that upon admission of Oklahoma as a state, the office of curator ceased to exist, because under the Oklahoma laws and constitution, there is no provision for curator. There is nothing in that contention. Sections 3477, 3478 and 3485 of Mansfield's Digest of the laws of Arkansas authorize the court to appoint a curator for the property and estate of the minor. Chapter 73 of Mansfield's Digest authorized the probate court to appoint "a guardian or curator of the person or estate of any minor;" the probate court could appoint one party guardian of the person and prop-

erty of the minor, or could appoint a guardian of the person and a curator of the estate. It is contended that there is no such office in Oklahoma as curator, but that is a highly refined *play* on words which *means* nothing. Curator is simply another word for guardian of the estate.

Thus, Woerner on Guardianship, page 48, says:

> "The term curator is, in America, said to have been borrowed from the civil law, and sometimes used to designate the person having charge of the infant's estate, in contradistinction to a guardian, who has charge of the person, or of both the person and estate."

Curator, as used in the Arkansas statute, simply means a guardian of the estate, while the word guardian may mean guardian of the person and estate, or simply guardian of the person. The Oklahoma statutes expressly authorize the appointment of a guardian for the person or a guardian for the estate, and there is no doubt under the Oklahoma statutes that the County Court may appoint one party a guardian of the person and another party guardian of the estate.

Chapter 33 of the Revised Laws of Oklahoma for 1910, beginning with section 3321, defines guardianships and classifies them. Section 3321 says:

> "A guardian is a person appointed to take care of the person or property of another."

The next section says that:

> "The person over whom, or over whose property, a guardian is appointed, is called the ward."

This chapter goes on to classify guardians as general and special and says that a general guardian is guardian of the person "Or of all the property of the ward within this state, or of both." Section 3334 says:

> "A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the ward at any place within the state, but not elsewhere, without permission of the court."

Section 3335 says:

> "A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, *nor make any sale of such property without the order of the County Court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward at the close of his guardianship, in as good condition as he received it.*"

Now, these two sections, as well as the others, expressly authorize the court to appoint a guardian of the person as separate and distinct from the guardian of the estate, and the Iowa Supreme Court, in *Lawrence* v. *Thomas*, 51 N. W. 11, held, under stat-

utes not nearly so plain as ours, that the probate court could appoint one party guardian of the person and another party guardian of the estate. Therefore, the County Courts of Oklahoma have the authority to do exactly the same thing the United States Court for the Southern District of Indian Territory had jurisdiction to do, to-wit, appoint a guardian of the person, as distinct from a guardian of the estate, the only difference being that under the laws of Oklahoma, the guardian of the estate is denominated *guardian,* whereas under the Arkansas law the guardian of the estate was denominated *curator.*

Thus, in *Duncan* v. *Crook,* 49 Mo. 116, the court, in holding that a guardian of the person could not apply for an order of the court to sell the ward's estate, that authority being in the curator, said:

> "We have adopted the term '*curator*' from the civil law, and it is applied to the *guardian of the estate of the ward,* as distinguished from the *guardian of his person.*"

In *Larned* v. *Renshaw,* 37 Mo. 459, the court in holding a minor might join in partition proceedings by his curator, said:

> "The distinction here taken between guardian and curator, we think, is more artificial than real, when applied to the question involved in this case."

The opinion goes on to trace the origin of curatorship and guardianship, and this court will probably

want to read it, and we will therefore not quote extensively from it.

In *Senseman's Appeal,* 21 Pa. St. 333, the court said:

> "The authority of a guardian bears a near resemblance to that of a father, and is plainly derived out of it, the guardian being only a temporary parent. He usually performs the office of both tutor and curator of the Roman law; the former of which had charge of the maintenance and education of the minor, and the latter the care of his fortune."

2 Words and Phrases, page 1785, says:

> "The word 'curator' when applied to the care of an estate, merely, means the same as 'guardian'; and the fact that an order of appointment designates the appointee as curator of an insane person instead of guardian, in the word of 2 Rev. St. 1879, Sec. 5791, providing for the appointment of a 'guardian' for the person and estate of an insane person is immaterial."
>
> —*Earley* v. *Bone,* 39 Mo. App. 388, 391.

Section 1 of the schedule to the Oklahoma constitution preserved this curatorship, and on admission of the state, the Eaves curatorship or guardianship case went into the County Court of Love County, having been pending in the United States Court for the Southern District, at Marietta, when Oklahoma was admitted. The County Court of Love County therefore had jurisdiction under sections 12 and 13 of article 7 of the Oklahoma constitution.

POINT TWO.

Two separate and distinct guardianships or curatorships cannot exist at the same time for one and the same person.

Woerner on Guardianship, page 112, says:

> *"So long as the appointment of a guardian to a minor, by a court in the rightful exercise of its jurisdiction, remains unrevoked, no one else can be appointed or recognized as the lawful guardian of such minor."*

See, *In re Guardianship of Danneker,* 8 Pac. 514.

Conceding, for the sake of argument, that Atha Thomas was *guardian of the person of Allie Daney,* by virtue of his appointment in 1911, in LeFlore County, yet he could not execute an oil lease.

—*Duncan* v. *Crook,* 49 Mo. 116;
Sec. 3335, R. L. Okla. 1910.

Section 3 of the Original Creek Agreement (31 St. L. 861) refers to guardians or curators, and so do sections 2 and 6 of the Act of Congress of May 27, 1908 (35 Stat. L. 312). In regard to leases for mineral purposes on the lands of minor allottees, section 2 of the Act of May 27, 1908, says that such lands may be leased "by the allottee, if an adult, or by guardian or *curator* under order of the proper probate court if a minor," etc., such leases, however, to be approved by the Secretary of the Interior. Section 6 of the Act of May 27, 1908, authorizes the Sec-

retary of the Interior to appoint local representatives to investigate the conduct of guardians or *curators* having in charge the estates of such minors, and,

> "Whenever such representatives * * * shall be of opinion that the estate of any minor is not being properly cared for by guardian or *curator*, or that the same is in any manner being dissipated or wasted * * * by the guardian or *curator*, such representatives * * * shall have power and it shall be their duty to report said matter in full to the proper probate court."

The very Act of Congress, Act of May 27, 1908 (35 Stat. L. 312), under which this lease was executed, expressly recognizes a guardian of the property, or curator, and this lease had to be made by the curator. The execution of the lease by Thomas was of no validity.

The narrative statement of the record, as agreed to by counsel for the government and the defendants over their signatures (Rec., p. 240) contains a recitation (Rec., p. 234) "that upon the admission of Oklahoma as a state on November 16, 1907, all guardianships, curatorships, administrations, and probate proceedings pending in the United States Court for the Southern District of the Indian Territory, at Marietta, Indian Territory, passed into the County Court of *Love* County, Oklahoma, said County Court of Love County, Oklahoma, being the successor to the United States Court for the Southern District of the Indian Territory in all probate proceedings pending

at Marietta, in said court," and "that on the 26th day of January, 1914, the County Court of Love County, Oklahoma, on the petition of J. J. Eaves, as curator of Allie Daney, entered the following order directing Eaves, as curator, to join in the oil and gas lease executed by A. N. Thomas, as guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam", said order being set out in full. *That agreement is a correct statement of the law and facts.*

—*Scott* v. *McGirth*, 41 Okl. 520;
Eaves v. *Mullen*, 25 Okl. 679;
Burdett v. *Burdett*, 26 Okl. 416.

The County Court of Love County never lost jurisdiction of the Eaves curatorship until it entered its order on March 31, 1914 (Rec., p. 237), transferring the case to the County Court of Carter County.

—*Crosbie* v. *Brewer*, 68 Okl. 16, 158 Pac. 388;
In re Guardianship of Chambers, 46 Okl. 139;
In re Henning's Estate, 128 Cal. 214, 60 Pac. 762;
In re Brady, (Id.) 79 Pac. 75;
Wackerle v. *People, ex rel.*, 168 Ill. 250, 48 N. E. 123;
Armour Packing Co. v. *Howe*, 68 Kans. 663, 75 Pac. 1014;
Dorman, Gdn., v. *Ogbourne*, 16 Ala. 759;
Seiberling & Co. v. *Newton*, 43 N. E. 151;

Sanford v. *Sanford,* 28 Conn. 6;
11 Cyc., page 690;
15 C. J., page 822.

Eaves was not only *de jure* curator but *de facto* curator because he actually occupied the office and exercised the authorities of a curator. There is no such thing as a *de facto* guardian or curator during the actual occupancy of the office by a *de jure* guardian. In a restricted sense the term "*de jure* officer" designates one who has the lawful right to an office but is not the actual incumbent thereof, either because he has never been in possession or has been ousted therefrom. But, in a more comprehensive sense, an "officer *de jure*", if actually occupying the office, excludes the possibility of a *de facto* officer. If the *de jure* officer is in possession of the office there can be no such thing as a *de facto* officer or *de facto* curator.

—Constantineau on the *De Facto* Doctrine, Sec. 21.

The record shows, beginning on page 228, that upon the petition of Solomon Daney, father of Allie Daney, the United States Court for the Southern District of the Indian Territory, sitting at Pauls Valley, appointed Eaves curator of Allie Daney on November 8, 1905; that Eaves executed and filed his bond (Rec., p. 229) on the same date, which was approved by the court; that on February 5, 1906, the said United States Court (Rec., p. 230) transferred

the Eaves curatorship from Pauls Valley to the United States Court at Marietta; that on February 5th, 1906 (Rec., p. 232), Eaves filed a report showing that he had selected at the Chickasaw land office an allotment for Allie Daney, describing it; that on April 18, 1906 (Rec., p. 233), Eaves filed an inventory setting forth a complete description of the land selected by him as an allotment for Allie Daney; that on the 5th day of March, 1907 (Rec., p. 233), the United States Court made an order substituting the Southern Trust Company as bondsman; that on October 11, 1913 (Rec., p. 236), Eaves filed a report in the Love County Court showing that he had leased part of the land of Allie Daney during the years 1905, '06, '07, '08, '09, '10, '11, '12 and 1913; that on March 31, 1914 (Rec., p. 237), the Love County Court entered an order transferring the Eaves curatorship to the County Court of Carter County; that on June 18, 1914 (Rec., p. 237), Eaves filed his report in the County Court of Carter County and prayed for permission to resign as curator; that on September 12, 1914 (Rec., p. 239), the Carter County Court entered an order accepting Eaves' resignation as curator and approving his final report; that on September 22, 1914 (Rec., p. 239), the County Court of Carter County entered an order transferring the Eaves curatorship to the County Court of LeFlore County, sitting at Talihina, Oklahoma, *and that is the way the case got into the County Court of Le-*

Flore County, and not until Eaves had resigned and the curatorship had been transferred to the County Court of LeFlore County, did A. N. Thomas at any time become the legal guardian of Allie Daney. After the County Court of Carter County had transferred the Eaves curatorship to the County Court of LeFlore County by its order of September 22, 1914, then and not until then did the LeFlore County Court obtain jurisdiction.

On September 24, 1914 (Rec., p. 227), Solomon Daney, father of Allie Daney, filed a verified petition in the County Court of LeFlore County asking for the appointment of a guardian for Allie Daney and nominating therein A. N. Thomas. "After due notice and on the hearing, the court made and entered the following order, and thereupon Atha N. Thomas executed a bond as required by law and the order of court with good and sufficient sureties, etc., and on the order of the court letters of guardianship were issued to Atha N. Thomas." Then follows (Rec., p. 227) a copy of the order appointing Thomas guardian, made and entered by the LeFlore County Court on the 30th day of September, 1914, more than a year after he had executed the lease involved in this case to Dunn and Gillam on August 18, 1913, and several months after the Secretary of the Interior had approved it after Eaves, curator, had also executed it.

POINT THREE.

This brings us to a discussion of the 2nd, 3rd, 4th and 5th conclusions of law heretofore asserted, to-wit:

(2) That the Departmental oil and gas lease executed by J. J. Eaves, curator of Allie Daney, to J. S. Mullen, on August 18, 1913, under the order and confirmation of the County Court of Love County (Rec., pp. 211-213) was a valid and binding oil and gas mining lease subject to the approval of the Secretary of the Interior—that is to say, it was as valid and binding as possible to make under the law, the Secretary's approval being necessary to its final confirmation.

(3) That Eaves, the legal guardian or curator of Allie Daney, having, on August 18, 1913, executed a lease to Mullen on this same land, duly authorized and confirmed by the County Court of Love County, the court having jurisdiction, the execution of a lease on the same land to Dunn and Gillam on the same date or any date thereafter by a pseudo or counterfeit guardian, no matter how fraudulently obtained, created no actionable wrong in favor of Allie Daney against the lessees (Dunn and Gillam) under such lease, in the absence of evidence that she suffered some injury thereby.

(4) That Dunn and Gillam, occupying *no fiduciary relationship* to Allie Daney, and having obtained nothing from her by virtue of the Thomas

lease, cannot be held to be trustees of any property or rights or interest acquired by them in the Mullen lease from Eaves by virtue of having used the Thomas lease as a means of coercing Mullen into a compromise agreement whereby they obtained from Mullen, and not from Allie Daney, an interest in the lease.

(5) **That the fact that Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease in no way alters the legal rights or status of the parties, it clearly appearing that the lease involved in this case never acquired any validity from its execution by Thomas, as guardian, and therefore, insofar as the rights of the parties are involved, we should treat the lease as having been executed solely by J. J. Eaves, curator of Allie Daney.**

CRUX OF THE CASE.

Mullen's lease from Eaves, curator, executed August 18, 1913 (Rec., p. 214), covered 130 acres and when approved by the County Court of Love County vested in Mullen a property right to submit the lease to the Secretary for his approval or veto. Although the Secretary's approval was a necessary element to render the lease finally valid and binding, nevertheless Mullen had the right to submit it for approval—a valuable right, which was at least in a qualified sense a property right.

The Eighth Circuit Court of Appeals, in *Anicker* v. *Gunsburg*, 226 Fed. 176, cited by appellant's

counsel, refers to an unapproved Departmental oil lease as an "inchoate lease prior to approval by the Secretary of the Interior," and in another part of the opinion refers to the "inchoate rights created by an oil and gas lease, signed by an Indian, but not approved by the Secretary of the Interior." The Thomas lease created no inchoate rights because he had no authority to act as guardian or curator, but Eaves lease to Mullen did.

Dunn and Gillam obtained their interest in the oil and gas leasehold rights in this 40 acres of land by virtue of a lease executed by J. J. Eaves, curator; they got their interest in the leasehold rights through Mullen, who had a valid lease executed by Eaves as curator and confirmed by the County Court of Love County on August 19th, 1913, which lease was subsequently surrendered by Mullen for a new and substituted lease executed by the same curator on this 40 acres. That is to say, the Mullen curator lease of August 19th, 1913, was surrendered by Mullen as to this 40 acres in consideration of a new lease from the same curator on this 40 acres, Mullen being compelled to surrender to Dunn and Gillam an interest in the lease in order to get his lease approved by the Secretary of the Interior. *Dunn and Gillam had no interest in the leasehold rights and never acquired any through the Thomas lease and the fact that they used the Thomas lease as a means of coercing Mullen into giving them an interest in a*

valid lease did not operate to take anything away from Allie Daney, but operated to take an interest away from Mullen, the lessee. If this is true, how can Dunn and Gillam be treated as trustees for Allie Daney, when they acquired nothing from her but acquired the interest from a third party?—an innocent third party—against whom there is no evidence of fraud. Mullen is found by the trial court, and admitted on this appeal by the Government, to have been an innocent party all along the line.

To appreciate this situation this court must put itself in the atmosphere of the facts.

FINDINGS OF FACT BY TRIAL JUDGE.

There is no contention that the following findings of fact by the trial judge are erroneous, to-wit:

> "That on the 8th day of November, 1905, J. J. Eaves, prior to the erection of the State of Oklahoma, was appointed curator of the estate of the said Allie Daney by the United States Court for the Southern District of the Indian Territory sitting in probate, and the said land, to-wit:
>
> > The South Half of the Northwest Quarter of the Southwest Quarter, and the West Half of the Southwest Quarter of the Southwest Quarter of Section Four (4), Township Four (4) South, Range Three (3) West,
>
> being then and there located in the Southern District of the Indian Territory and having been prior to that time allotted to the said Allie

Daney and said Allie Dancy then and there being the owner of said land.

That after the erection of the State of Oklahoma, said curatorship or proceedings thereof was duly transferred to Love County, Oklahoma, and that the said J. J. Eaves, as such curator, on the *18th day of August, 1913*, executed an oil and gas lease to J. S. Mullen covering said lands, and that J. S. Mullen presented the said oil and gas lease to Dana H. Kelsey, acting in the capacity of Superintendent to the Five Civilized Tribes, for approval.

* * * * * * *

"I further find that said lease from said Thomas to Dunn and Gillam was also filed with the said Dana H. Kelsey, acting in the capacity as Superintendent of the Five Civilized Tribes, for approval, but that he declined to approve either one of them as long as there was a controversy as to which was the *de jure* guardian of the estate of Allie Daney.

I further find that the said Dana H. Kelsey, acting as Superintendent to the Five Civilized Tribes, suggested to the holders of the respective leases that they organize a corporation and call it the Bull Head Oil Company, the holders of the respective leases each to have one-half of the stock of said company, and that the said J. J. Eaves, as curator of said estate, to join in the said lease executed *or to be executed by the said A. N. Thomas*, and that after the lease was appraised and its bonus value ascertained and paid, that then he would approve the lease so executed and assigned to the said Bull Head Oil Company for whatever bonus was determined by such appraisement to be paid.

I find that this plan was carried out by the parties with the addition of five acres known as the Gladney tract, which was added to the Bull Head Oil Company's Allie Daney holding, and its value was included in the capital stock of the company in the value of $2,000 and the Allie Daney lease at $16,000, making the total capital stock of $18,000.

The holders of the original lease from J. J. Eaves, as curator, otherwise known as the Mullen's interest, were to and did receive eight thousand dollars of the capital stock of the Bull Head Oil Company.

The holders of the original A. N. Thomas lease, otherwise referred to as the Dunn and Gillam interest, were to and did receive eight thousand dollars of the capital stock of said oil company, L. S. Dolman and Gladney to receive one thousand dollars each of the original stock of the company—Gladney having furnished a lease on five acres not within the Allie Daney holdings—the Gladney stock not to participate in the voting of the corporation. The stock of the Mullen interest was issued to J. S. Mullen, Errett Dunlap and L. S. Dolman, and the stock representing the Dunn and Gillam interest was issued to T. H. Dunn, as trustee.

* * * * * * *

"I find that at the time the lease was executed by J. J. Eaves as curator of the Allie Daney estate he was then and there the regular guardian of her estate, and that when he joined in the A. N. Thomas lease, having first been specifically authorized to that end by the County or Probate Court of Love County, he was then and there the regular guardian of her estate and

that when he acted in joining in the lease by executing it, Mr. Dana H. Kelsey, the Superintendent of the Five Civilized Tribes and representative of the Secretary of the Interior as to the initiation of such matters, that the same was done at his suggestion and that when J. J. Eaves as curator acted in joining in the execution of said lease and same was approved by the County or Probate Court of Love County, that this was done at the suggestion of said Dana H. Kelsey, Superintendent of the Five Civilized Tribes, and representative of the Secretary of the Interior; that by the act of the said J. J. Eaves as curator, and the authorization and approval of the County or Probate Court of Love County, placed the oil and gas legal title in Dunn and Gillam *to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior, and afterwards the bonus fixed by the Secretary of the Interior through the Superintendent of the Five Civilized Tribes, to-wit: two thousand dollars was paid and said lease approved by the Secretary of the Interior.*

I hold that this had the effect of putting the oil and gas legal title in the Bull Head Oil Company free from the legal effect of fraud in the execution of the lease by A. N. Thomas as guardian, for he was not the *de jure* guardian of the estate of Allie Daney. J. J. Eaves was the legal guardian of her estate. A. N. Thomas may have been under his appointment the guardian of her person but it is not necessary to pass on that question.

Whilst I find from a fair preponderance of the evidence that there was legal fraud in the

execution of the original lease by A. N. Thomas, as guardian, to Dunn and Gillam, by the placing of an interest in J. J. Thomas' name for the personal and private benefit of A. N. Thomas, yet as I have stated, I find that J. J. Eaves was the legal guardian of her estate and that the lease executed by him was the valid lease and when he joined in this A. N. Thomas lease that carried the oil and gas legal title when it had been authorized by the County or Probate Court of Love County and afterwards approved by that court and afterwards approved by the Secretary of the Interior who approved the lease so joined in by him, and that had the effect of placing the oil and gas legal title in the Bull Head Oil Company *free from fraud.*" (Rec., p. 69.)

MULLEN'S POSITION.

The undisputed evidence and the findings of the trial court show that Mullen was the victim of these untoward circumstances, to-wit: Although he had a valid guardianship lease from Eaves, approved by the County Court of Love County on August 19th, 1913, subject to the Secretary's approval, he was confronted with one of two alternatives, to-wit: he must either give up half to Dunn and Gillam or suffer his lease to be disapproved by the Secretary of the Interior.

This point is pretty well recognized in the Government's bill, paragraph 11 (Rec., p. 10) wherein it is alleged:

"That on the same day, August 19, 1913, that the A. N. Thomas lease described in paragraph No. V was executed, an oil and gas lease was executed by J. J. Eaves of Ardmore, Oklahoma, representing himself to be curator of the estate of said Allie Daney, same being in favor of J. S. Mullen and *covering among others,* the lands described in paragraph No. 1 hereof; said lease was filed for approval with the United States Indian Superintendent at Muskogee, Oklahoma, August 23, 1913, resulting in a contest before said Superintendent between J. S. Mullen, on the one side, and T. H. Dunn and J. Robert Gillam on the other, as to which of said leases should be approved. That after the organization of said corporation and about January 30, 1914, the respective lessees effected a compromise agreement touching said contest, as a result of which J. S. Mullen withdrew his application for the approval of the lease of J. J. Eaves, curator, to himself so far as concerned the lands described in paragraph No. 1, and induced the said Eaves to attach his signature as curator to the lease described in paragraph No. V, and said Mullen subsequently abandoned entirely the lease of J. J. Eaves, curator, to himself, and requested that same be disapproved by the Secretary of the Interior, which was accordingly done. That no consideration was paid or agreed to be paid to said J. J. Eaves, as curator, for his joining in the execution of said partnership lease of A. N. Thomas, in paragraph No. V described, and that his signature as such curator to said lease was wholly without effect, illegal and void; but that notwithstanding the void character of such act on the part of said J. J. Eaves, same was made

the basis of an agreement on the part of the Bull Head Oil Company, and on the part of T. H. Dunn and J. Robert Gillam, who controlled said corporation, on the one hand, and J. S. Mullen, on the other, whereby 8,000 shares, of the par value of one dollar per share, of the capital stock of said corporation was to be issued to said J. S. Mullen and associates, among whom were Jake L. Hamon, F. M. Adams and Errett Dunlap."

Honorable Dana H. Kelsey, United States Indian Superintendent, throws a flood of light on this whole situation. Mr. Kelsey (Rec., pp. 170-174) explains in detail the whole situation, as follows:

Q. "Tell how you regarded the situation presented to the Interior Department by the filing of these two leases, the one by Dunn and Gillam and the other to Mullen, executed by Thomas claiming to be the guardian of the minor and by Eaves claiming to be the curator of the minor?

A. When these two conflicting leases were brought to my attention as Superintendent the same as any other conflicting ones, the first procedure was to notify both parties, as the copies will show in this case, of the filing of the conflicting instruments, to give them an opportunity to show cause why their lease should be approved. When the facts were secured showing that in this particular case there was only one question for consideration, namely, which was the legally appointed guardian entitled to act for this minor Indian, I notified the counsel, and probably the principals also, that it occurred to me that no action of the Department in approving

one of these contracts, would settle the question of the legality of the guardianship.

Q. Was that the view you took of the situation presented by the filing of these two conflicting leases at that time?

A. Exactly.

Q. Now, Mr. Kelsey, entertaining the view you have indicated by your answers, above, tell what, if anything, you did with that situation before you?

A. Following the procedure of the Interior Department we could have recommended the approval of one of the leases presented, and the disapproval of the other one, but knowing, as I did, the complications with reference to the guardianship I thought that this would not settle the matter, and that in all probability the controversy would get into the courts, and development might be stopped in the meantime, and after carefully considering the matter and securing the report as to the situation in the field, and ascertaining that this was a small tract of land lying almost in the heart of the Healdton oil producing area where active developments were going on, I first notified the counsel for the contending parties that in my judgment this was a case that should be adjusted, and if possible both guardians join in one instrument which then could be approved and without question convey a legal oil and gas mining lease. Later one of the principals, I think *Mr. Mullen, called on me and I told him that the matter had dragged along about long enough, that there seemed to be no way of determining this matter without disapproving both contracts;* that development had proceeded to such an extent that

the land would soon be drained, and that I thought there certainly was a middle ground somewhere where the two parties could get together, have the guardians both join in one lease *or* the other, and allow operations to proceed, then let the guardians fight among themselves as to which was the proper person to receive the royalty; *that if something along this line was not done very shortly I would recommend the disapproval of both leases,* and do whatever I could to see that the two guardians adjusted their troubles among themselves, or both of them sell the lease over again to allow operation to proceed. Mr. Mullen at that time said that there was such bitter feeling between the two parties and that he doubted they could get together. I think, as the record will show, shortly thereafter I notified by mail the opposing parties that something must be done soon, and that I believed a conference of all the parties together would result in good. I later had this conference at Ardmore in company with the local representative of the Department there. I visited the Healdton field, saw the situation on the ground, saw that the property soon would be drained, and in reality issued an ultimatum to both Dunn and Gillam and J. S. Mullen that unless they did get together on some basis within a very few days, I would recommend both leases for disapproval.

Q. Did you indicate to Mullen and Dunn and Gillam how they could settle the controversy between them; that is the procedure, or method by which they could unite their interests?

A. They, of course, asked me that when we finally got them so they would talk to each other, *and*

I said it didn't make any difference to me whether the Dunn-Gillam lease or the Mullen lease was approved; that if the LeFlore County lease was the one to be approved, the Love County curator should join. If the Love County lease should be approved, that the LeFlore County guardian should join. If one would withdraw or agree to assign an interest to each other it was a matter absolutely immaterial to me. I was doing what I thought was the duty of an executive officer to protect the interests of the minor.

Q. Did you make any statement to Dunn and Gillam on the one hand, and Mullen on the other, that if they would have both guardians join in one or the other of the leases, and the lessee make an assignment to the other contesting lessee, that you would make any recommendations in regard to the approval of that assignment to the Secretary of the Interior?

A. I did. I said if they did not care to entirely withdraw, one side or the other, that I would recommend an assignment of such part interest as they might agree among themselves upon.

In other words I suggested to them that *if* Eaves joined in the Dunn and Gillam lease I would recommend the Secretary to approve an assignment of an interest in that lease from Dunn and Gillam over to Mullen, *or vice versa;* I am not sure whether or not the parties advised me before I left Ardmore that they had come to an agreement among themselves, or whether they wrote me or wired me thereafter —'I know it was very soon after the conference;' I don't think there was any agreement between these parties at Ardmore 'as to which

lease would be finally submitted for approval and which would be withdrawn;' I think they advised me 'that they would have both guardians join in one lease, and I sent my *Oil Inspector to Ardmore with the original papers and instructed him* to investigate the property and make a report to me as to what, if any, increase of the bonus should be assessed up against the lease that we would finally recommend for approval. He was to take these *leases* to Ardmore for the purpose of allowing one of them to be joined in by the other guardian;' *my Inspector took the Eaves lease and the Thomas lease both to Ardmore with him 'so that one or the other of them could be executed by the other guardian;'* the lease executed by Thomas, guardian, to Dunn and Gillam and subsequently executed by J. J. Eaves, curator, was returned to my office executed in that manner; I recommended its approval to the Secretary of the Interior.

Q. Now, at the time that it was returned to your office executed by Eaves, that is the Thomas lease, were you advised what part or portion of that lease was to be assigned to Mullen by Dunn and Gillam, lessees?

A. No, it was my understanding that these people were not business associates, in fact they were very *strong competitors,* and it was difficult to get them together at all, and they had decided to form a corporation, and my report so shows, report of January 31st, transmitting the lease so shows.

A corporation was organized by Dunn and Gillam and Mullen to take over the lease—its name is Bull Head Oil Company; I recollect

how the corporation got its cognomen; 'I recollect very distinctly that when Mullen was in my office, or perhaps later at the conference at Ardmore, it was almost impossible for me to make either one of them talk sense about the matter, and I said if the two sides didn't get their bull heads together themselves I would have to do something to make them, and I think it got the name right then;' I remember the filing in the office of the assignment from Dunn and Gillam to the Bull Head Oil Company—the assignment of the whole lease; I recommended the approval of the assignment to the Secretary of the Interior; I don't remember how the stock was to be divided, but suppose the papers showed at that time, as we required a statement of that kind to be filed and to go to the Department along with the papers; the rules and regulations of my Department required the Bull Head Oil Company as assignee of the lease to show who its stockholders were, and no doubt such statement was filed, but I don't remember the details; my Department also required the Bull Head, as the prospective assignee, to make a financial showing of its ability to develop the property before I would recommend the approval of the assignment; such a financial showing must have been made by the Bull Head Oil Company or I would not have recommended the approval of the assignment; affidavits were required with all applications for approval of assignments showing the capital stock paid in; I remember that 'when the terms of the proposed compromise between Dunn and Gillam on the one hand, and Mullen on the other was under negotiations,' I made

suggestions and advised them in regard to eliminating one of the conflicting guardians.

Q. Why did you make that suggestion?

A. The principal thought I had in insisting upon a compromise so that one lease or the other could be legally approved so as to have the property developed and protected, and if there were two guardians who were going to litigate over who should have the fund, the royalty, the minor might not get the benefit of it for sometime, and I thought in an adjustment of the matter one guardian or the other could be induced to withdraw.

When I was in Ardmore discussing with the parties the settlement I am quite sure I visited the forty acres of land in question; it must have been in December, 1913, or in January, 1914, 'I am not sure whether I went out on that particular trip, or just prior thereto, or thereafter, but it was sometime when that thing was before me;' as stated by me I directed the Oil Inspector to investigate the situation with respect to the bonus, to increasing the bonus, and 'he made a report to me recommending some increase, which I approved and required the lessees to comply with;' my Oil Inspector, as I recollect, recommended 'that the lessees be required to pay a bonus of $2000.00 out of the first oil produced from the land, after deducting out the one-eighth royalty;' the lessees agreed to pay that and they furnished a surety bond guaranteeing the performance of that obligation; Dunn and Gillam agreed to pay that 'and if they assigned it, the assignee accepted the obligation'."

When this matter was fresh in Mr. Kelsey's mind in January, 1914, he made a full written report to the Commissioner of Indian Affairs in a letter of January 31, 1914 (Rec., p. 106), which letter is as follows:

"Union Agency,
Muskogee, Okla., Jan. 31-1914.

The Honorable,
Commissioner of Indian Affairs.

Sir:- There is respectfully submitted herewith an oil and gas mining lease covering certain land in the Chickasaw Nation, executed as follows, in favor of T. H. Dunn and J. Robert Gillam: (Description here omitted.)

The records of the office show that this is the first lease filed by these lessees as copartners, and although both have other Department lease holdings it does not appear that either is in any manner interested in more than the maximum acreage. On Form B they state that they have combined resources amounting to $100,000 with at least $5000 available for development of this lease. Neither of these lessees is shown to be interested with any firm or corporation doing an interstate pipe line business in Oklahoma, and both the lessees and the surety on their bond are in good standing with the Department.

There was filed with the above lease copy of letters of guardianship issued to Atha N. Thomas as guardian of Allie Daney, a minor, by the County Court of LeFlore County, Oklahoma, dated July 24, 1911, and order of said County Court confirming this contract of lease in favor of Dunn and Gillam.

On August 23, 1913, there was filed with this office lease executed by J. J. Eaves, Curator of Allie Daney, a minor, *in* favor *of J. S. Mullen, dated August 18, 1913.* Accompanying this lease were letters of curatorship issued to J. J. Eaves by the United States Court for the Southern District of Indian Territory, dated November 8, 1905, *and an order of the County Court of Love County, Oklahoma, to which county this curatorship case was transferred after statehood confirming the contract of lease to J. S. Mullen.* This lease described all of the land embraced in the lease executed in favor of Dunn and Gillam, as well as other lands allotted to this lessor.

The respective lessees were notified that their leases conflicted and each responded with a brief protesting against the approval of the other lease. *The arguments presented on both sides were to the effect that the guardian or curator who executed the other lease was not the legal guardian or curator, and therefore had no authority to lease the land in conflict.* * * *

The conflict over the matters of guardianship arising, it was thought necessary to hold a hearing, which was accordingly done, at Muskogee, Oklahoma, on December 13, 1913, and the briefs above referred to, together with copy of the testimony taken at this hearing, are transmitted herewith.

The facts in the case present only one question for consideration; *which was the legally appointed guardian entitled to act for Allie Daney at the time the leases were executed?* It appears that this office would not have been warranted in making a favorable recommendation on eith-

er of the leases *until the court had determined which was the legal guardian or curator.* It appears, also, that there was filed in the County Court of Love County a petition for the removal of the matter of the guardianship or curatorship of Allie Daney, a minor, to the County Court of LeFlore County, Oklahoma, where the minor has always resided, in order to finally determine the matter of guardianship. This action was resisted by J. J. Eaves, curator, who desired to have the case transferred to Carter County, Oklahoma. This cause came on for hearing on October 13, 1913, and by order of the court was transferred to LeFlore County, from which decision an appeal was immediately taken.

From the attitude of the parties concerning the matter of guardianship it appeared that *endless litigation* was at hand, and consequently the leases might be held up indefinitely awaiting final action by the courts.

With the interests of the minor in view, I communicated with the lessees of the conflicting leases with the object of holding conference with them or their attorneys to the end that arrangements might be made for protecting their interests as well as those of the minor lessor.

At the conference subsequently held, a compromise was effected, wherein J. S. Mullen, lessee in the prior lease, *requests the Department to disapprove his lease in so far as it covers the land described in the lease to Dunn & Gillam. J. J. Eaves, as curator of Allie Daney, has entered into the execution of the lease in favor of Dunn & Gillam, to which the County Court of LeFlore County has given its approval.*

It is further agreed between the parties that they shall organize an oil company, the sole stockholders in which are to be parties lessee in these two leases. To this company Dunn & Gillam have agreed to assign their lease in full. As it will take some time to have the assignment papers executed it is thought advisable to transmit the lease with recommendation for approval at once. Upon return of the parts, if the lease is approved, same will be held in this office pending the filing of the proposed assignment thereon.

On January 24, 1914, the United States Oil Inspector reported that the bonus of $70.00 *paid by Dunn & Gillam was inadequate, and advised that it is to the best interests of the minor that in lieu of an additional cash bonus to be paid at this time, the lessees be required to pay a further bonus of $2000.00, to be taken out of the proceeds of the sale* of the first oil produced, and to be paid in monthly installments at the rate of 25% of the gross monthly runs exclusive of royalty interests at 12½ per cent recited in the lease.

Messrs. Dunn & Gillam have entered into a stipulation in which they have agreed to pay the bonus consideration precisely as above recommended, and this stipulation has been made a part of the lease. Special bond of $2000, with the Southern Surety Company as surety, guaranteeing the performance of the obligations assumed in this stipulation has been prepared and forwarded to Ardmore, Oklahoma, for the signature of the lessees.

From the report of Field Clerk Mills, dated December 11, 1913, and other reports received

at this office, it is known that developments have already reached the lands owned by Allie Daney, and activities there admit of no doubt that the lands of this minor are in great danger of being drained of oil, there being already two wells in operation, wells to off-set which should be drilled at once.

In view of the facts set out above it is respectfully recommended that this lease be immediately approved to extend to November 16, 1921, during minority of lessor, and as much longer thereafter as oil or gas is found in paying quantities, together with accompanying bond, and that the office be advised by wire in order that the lessees may begin drilling operations without further delay.

Respectfully,

DANA H. KELSEY,

United States Indian Superintendent.

P. S. The Mullen lease, which he asks to be disapproved, in so far as the enclosed lease is concerned, *also covers considerable land in another location,* which is not being drained, and which lease is not yet ready for submission, but will be forwarded later, as soon as steps can be taken in due course of procedure to have one of the guardians discharged and the other held to be the only legal guardian. The lessees adjoining the forty acres in question have just commenced to take much oil within the last few days, which will begin to drain this forty acres. Therefore, early action is necessary. Messrs. Dunn & Gillam are ready to move in a drilling outfit immediately.

D. H. K."

Again, and on April 5, 1914 (Rec., p. 115), Mr. Kelsey makes another written report to the Commissioner of Indian Affairs submitting to the Secretary the assignment from Dunn and Gillam to the Bull Head Oil Company, in which he again reviews the compromise agreement between the parties, the organization of the Bull Head Oil Company, the assignment of the Gladney lease to the Bull Head Oil Company and a general outline of the situation. In this letter of April 5, Mr. Kelsey submits to the Secretary for approval the *assignment from Dunn and Gillam to the Bull Head* and also the assignment from J. W. Gladney to the Bull Head, and in detailing the origin of the Bull Head, says:

> "The organization of this company was in accordance with an agreement entered into between J. S. Mullen, lessee under lease No. 27,-983, now on file in this office awaiting completion thereof, and T. H. Dunn and J. Robert Gillam, lessees under lease No. 27956. These leases were in conflict as to all lands described in the subsequent lease. In effecting this compromise the parties lessees entered into a stipulation wherein J. S. Mullen, lessee in the prior lease, requested the Department to disapprove his lease insofar as it covers the lands described in the subsequent lease to Dunn and Gillam, and recommendation to that effect will be made when lease No. 27983 is forwarded to the Department for consideration, in consideration of Dunn and Gillam assigning their lease after approval thereof to an oil company to be sub-

sequently organized, the stock to be equitably distributed between the contesting parties. * * *

It is in pursuance of this agreement that the assignment of lease No. 27965 from Dunn and Gillam to the Bull Head Oil Company is now being submitted to the Department for consideration."

These reports of Mr. Kelsey were introduced in evidence by the plaintiff.

L. S. Dolman, witness for defendant, testified as follows (Rec., p. 142):

"I have examined defendants' Exhibit 9; this agreement was presented to Mr. Kelsey, the Indian Agent; when the settlement was made and agreed upon in the form of a contract we presented the whole thing with the assignment to Mr. Kelsey; Mr. Kelsey was here some time in January, 1914, and he 'called us together and notified us *he was going to reject both leases unless we got together and compromised and we then held a conference and agreed we would split the stock and organize this stock company.* Split the stock between the two lease holders. We also agreed we would ask for a refusal of the Mullen lease and Mr. Eaves would sign the Thomas lease and we would then go before the County Court of Love County and have the lease approved as requested by Mr. Kelsey.'

Q. Was this done?

A. Yes, sir."

J S. Mullen (Rec., p. 160), testified as follows:

"I am the same J. S. Mulen who obtained

a Departmental oil lease from J. J. Eaves, curator of Allie Daney, on the forty acres of land executed on August 13, 1913; when I got the lease I had Mr. Adams, my attorney, file it with the Secretary of the Interior's representative at Muskogee; after filing this lease I learned that Dunn and Gillam had leased from A. N. Thomas, guardian; we had a contest before the Indian Department's office at Muskogee; this contest brought about strained relations and the feeling became bitter; Mr. Kelsey, Indian Superintendent, took steps to get Dunn and Gillam and myself together and he came here to Ardmore and he had us come to Muskogee; Mr. Dolman was an attorney for Dunn & Gillam and we went to Muskogee and Mr. Kelsey *told us he would not approve either one of the leases if we did not get together;* after that we got together but the feeling between us was so bitter and so obstreperous that Mr. Kelsey named us the Bull Head Oil Company—Mr. Kelsey suggested it; I have examined defendants' Exhibit No. 9, being the *compromise contract of January 9, 1914,* with respect to the Gladney lease will say Dunn and Gillam would not yield until we agreed to put in the Gladney five-acre lease, one-half of which indirectly went to pay Dunn and Gillam's attorney, Dolman."

Frank M. Adams (Rec., p. 159) testified as follows:

"Mr. Kelsey came to Ardmore and we discussed the matter a number of times; the contract of January 9, 1914 (the settlement agreement, defendants' Exhibit 9), was exhibited to Mr. Kelsey and we discussed it; the compromise contract between Dunn and Gillam and

Mullen was made by the Dunn and Gillam faction and ourselves at the suggestion of Mr. Kelsey; he came here to Ardmore and was very much irritated at the fact that we were permitting offset wells to be drilled against the minor's property and no lease yet on the minor's property, and said the two factions must get together and thereupon some member of our faction (the Mullen faction) *went to Dunn and Gillam* and they said they would compromise provided we would get the Gladney five-acre lease transferred to the Bull Head and then we would split the stock fifty-fifty—that is, one-half to Dunn and Gillam and the other half to Mullen and his associates; *the Gladney five acres joins the Allie Daney forty acres.*"

The alleged compromise agreement between Dunn and Gillam, on the one hand, and Mullen on the other (Rec., p. 135), is as follows:

COMPROMISE AGREEMENT.

"*Agreement,* between J. S. Mullen, party of the first part, and T. H. Dunn and J. Robert Gillam, parties of the second part:

Witnesseth: That whereas there is now pending before the Department of the Interior for approval oil and gas leases as follows:

The oil and gas lease executed by J. J. Eaves, curator of Allie Daney, a minor, approved by the County Court of Love County, Oklahoma; the oil and gas lease executed by A. N. Thomas, guardian of Allie Daney, a minor, approved by the County Court of LeFlore County, Oklahoma; both of which said leases cover the W2 of SW4 of SW4, and S2 of NW4

of SW4 of Section 4, Township 4 South, Range 3 West; and

Whereas, said parties have agreed upon a settlement of the differences concerning the same:

Now, therefore, as a memorandum of said settlement, it is hereby agreed that said party of the first part will take such action as will result in the Dunn and Gillam lease being executed properly by J. J. Eaves, as curator of Allie Daney, and the curatorship proceedings transferred to LeFlore County, Oklahoma, and that said J. J. Eaves will resign from said curatorship.

That a corporation will be organized under the name of the Bull Head Oil Company, or such other name as will be acceptable, with a capital stock of eighteen thousand ($18,000.00) dollars; that said parties of the second part shall assign to said corporation, said lease, upon its approval by the Secretary of the Interior.

That said party of the first part will cause to be assigned to said corporation what is known as the 'Gladney' oil lease, consisting of five (5) acres of restricted lands, being the W2 of SW4 of NE4 of SW4 of Section 4, Township 4 South, Range 3 West; all of which assignments shall be filed with the Department of the Interior, and such action taken as will perfect the title to the same in said corporation to be organized.

That upon the incorporation and organization of said company, and in consideration of the said assignments, stock shall be issued to

party of the first part, or such persons as he may designate, in the amount of $8,000.00, and to the parties of the second part, or such persons as they may designate, stock in the amount of $8,000.00, and there shall be issued to L. S. Dolman $1,000.00 of said stock, which shall be in full payment to him of legal services performed heretofore, and for the incorporation and organization of said company, and perfecting of the title to said leases in said company and no further. That $1,000.00 of non-voting stock shall be issued in the name of J. W. Gladney, and said J. W. Gladney, his heirs, administrators and assigns, shall participate in all the revenues and profits of said company, but that said stock shall be marked non-voting and remain in the care and keeping of the Secretary of said corporation.

It is further agreed that all expense necessary to the perfecting and approval of said lease, and the incorporation and organization of said company, shall be borne equally by the parties hereto.

In witness whereof, we have hereunto set our hands in duplicate, on this the 9th day of January, 1914.

J. S. MULLEN,
Party of the First Part.

T. H. DUNN,
J. ROBT. GILLAM,
Parties of the Second Part."

Mullen's original lease from Eaves covered *130 acres* (Rec., pp. 214-215), and in accordance with the compromise agreement "Mr. Mullen, lessee under

the separate lease executed to him by Eaves, curator," as testified to by Mr. Kelsey, "requested me to disapprove that lease insofar as this forty acres of land covered in the Thomas lease was concerned and '*he made that request as a part of this compromise agreement with Dunn and Gillam*'."

It was immaterial to the Department and to the parties whether Thomas joined in the Eaves lease to Mullen or Eaves joined in the Thomas lease to Dunn and Gillam, that being a mere formality, it being the intention of all parties that if the Thomas lease to Dunn and Gillam was good Mullen should have an interest therein and if the Eaves lease to Mullen, confirmed by the County Court of Love County, August 19, 1913, was good, then Dunn and Gillam should have an interest in that lease.

Obviously when the parties came to the practical side of the compromise they found it expedient for Eaves to execute the Thomas lease instead of Thomas executing the Eaves lease to Mullen *because Mullen's lease from Eaves covered 130 acres,* whereas the parties were only dealing with the 40 acres alone, described in the Thomas lease to Dunn and Gillam. As stated, the Eaves lease to Mullen covered 130 acres, including the 40 acres involved in this case (Rec., p. 214), and that is admitted in the Government's bill, paragraph 11, record, page 10. This is clearly shown by the testimony of *Mr. Kelsey,* Indian Superintendent, as well as the testi-

mony of other witnesses. The appellant introduced in evidence as a part of its case in chief the cross examination of Mr. Kelsey set forth in his deposition taken by defendants, and read the following to the court (see Rec., p. 104), to-wit:

> "He was only interested in having one of the guardians out of the way and proper guardian appointed for the minor; *it was absolutely immaterial to him which one got out of the way or which one held the custody of the property;* the lease executed by Eaves to Mullen contained in addition to the small tract in the heart of the Healdton field, *some other land, that land was to be eliminated from the Mullen lease;* Mullen asked that the lease be disapproved as to this forty acres involved, but he didn't ask that he disapprove the remaining lease on some ninety acres, but the lease was kept in his office at Muskogee allowing Mullen a short time to take that lease to the LeFlore County Court to get *Thomas to join as to the other part of this land.*"

Mr. Kelsey further testified (Rec., p. 172):

Q. "Did you indicate to Mullen and Dunn and Gillam how they could settle the controversy between them; that is the procedure, or method by which they could unite their interests?

A. They, of course, asked me that when we finally got them so they would talk to each other, *and I said it didn't make any difference to me whether the Dunn-Gillam lease or the Mullen lease was approved; that if the LeFlore County lease was the one to be approved, the Love County curator should join. If the Love Coun-*

ty lease should be approved, that the LeFlore County guardian should join. If one would withdraw or agree to assign an interest to each other, it was a matter absolutely immaterial to me. I was doing what I thought was the duty of an executive officer to protect the interests of the minor.

Q. Did you make any statement to Dunn and Gillam on the one hand, and Mullen on the other, that if they would have both guardians join in one or the other of the leases, and the lessee make an assignment to the other contesting lessee, that you would make any recommendation in regard to the approval of that assignment to the Secretary of the Interior?

A. I did. I said if they did not care to entirely withdraw, one side or the other, that I would recommend an assignment of such part interest as they might agree among themselves upon.

In other words, I suggested to them that *if* Eaves joined in the Dunn and Gillam lease I would recommend the Secretary to approve an assignment of an interest in that lease from Dunn and Gillam over to Mullen, *or vice versa;* * * * I think they advised me 'that they would have both guardians join in one lease, and I sent my *Oil Inspector to Ardmore with the original papers and instructed him* to investigate the property and make a report to me as to what, if any, increase of the bonus should be assessed up against the lease that we would finally recommend for approval. He was to take these *leases* to Ardmore for the purpose of allowing one of them to be joined in by the other guardian'; *my Inspector took the Eaves lease and the Thomas lease both to Ardmore*

with him 'so that one or the other of them could be executed by the other guardian'; the lease executed by Thomas, guardian, to Dunn and Gillam and subsequently executed by J. J. Eaves, curator, was returned to my office executed in that manner; I recommended its approval to the Secretary of the Interior."

Mr. Kelsey further testified (Rec., p. 176) as follows:

"I do not remember whether or not I was advised at the time the compromise was made between the parties whether the Eaves lease would be eliminated or the Thomas lease would be eliminated but 'the discussion was that one of them would be, and I rather think that Eaves was to be eliminated and Thomas was to remain as guardian'; the purpose in eliminating one of them was to eliminate any controversy about who was entitled to the royalty; I remember making some suggestion that both Thomas and Eaves resign and let one of our Government men or some one they would select be appointed in the county in which the minor resided and settle the trouble."

Equity regards the substance instead of the form, and because by a mere coincidence Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease to Mullen, the Government claims that the lease should be cancelled or that the interest Dunn and Gillam acquired under the Eaves lease through Mullen, *admittedly free from fraud,* should be impressed by a decree in equity as trust property for Allie Daney.

MULLEN THE ONLY PERSON HAVING RIGHT TO COMPLAIN.

The Eaves, curator, lease to Mullen and the Thomas lease to Dunn and Gillam were both Departmental leases on exactly the same form, containing the exact same covenants, conditions and provisions, the bonus being subject to determination by the Indian Superintendent in the first instance and finally by the Secretary of the Interior. Mullen's surrender of the Eaves lease approved by the County Court of Love County on August 19, 1913, for a new lease from Eaves, curator, to himself and Dunn and Gillam, Dunn and Gillam being *trustees* for Mullen and the Bull Head Oil Company under the compromise agreement suggested by the Indian Superintendent, *in no way injured or damaged Allie Daney.*

Shorn of its trappings, the Government's case is based on this contention: That Allie Daney is entitled to a decree in equity adjudging Dunn and Gillam to hold in trust for her all the interest they acquired in the oil and gas leasehold rights in her 40 acres because they used a fraudulent lease from her counterfeit guardian as a means of forcing Mullen to give them half interest in a valid lease on her land. If Dunn and Gillam had occupied any *fiduciary relationship* to Allie Daney by which they profited individually to her injury, the law quoted in the Government's brief would be applicable. *Dunn*

and Gillam occupied no fiduciary relationship either in fact or in law to Allie Daney, and we are unable to find any legal proposition or any principle of equity upon which the Government can place its feet as a foundation for a decree in this case. *Mullen is the only one who had any right to complain.* He lost a half interest in this lease to Dunn and Gillam, but Allie Daney lost nothing, nor did Dunn and Gillam acquire anything from her. *It is difficult to see how the court can hold in one breath that Allie Daney lost nothing, then hold in the next that Dunn and Gillam are her trustees ex maleficio of all interest they acquired in the lease through a compromise agreement with Mullen.*

ALLIE DANEY SUFFERED NO INJURY.

Two things must concur to constitute actionable fraud—inequitable conduct and injury. In other words, fraud and damage must concur before a court of equity will grant any relief against a judicial sale.

The lease required court approval and partakes of the nature of a judicial sale.

Story's Eq. Juris., 14th ed., Vol. 1, sections 289 and 290 are as follows:

> "*Sec. 289.* And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss

or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth by a very learned judge in equity, that fraud and damage coupled together will entitle the injured party to relief in any court of justice.

"*Sec. 290.* In order to sustain an action on a fraudulent contract, it is necessary that there be both allegation and proof of damage, at least to some extent. Fraud must concur with damage to be actionable. However grievous the fraudulent conduct may have been, no action will ordinarily lie if the defrauded party ratified the fraudulent act, whether with or without injury; and so, if he was not cognizant of the real facts until the transaction was entirely consummated, he c a n n o t complain that a fraud has been perpetrated, if he has not been the loser thereby. It is fundamental, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action. If the deceit does not end in the making of the contract, but still further influences a party to the contract in his conduct under it, it is obviously a deceit of a continuous nature, of which the injured party may justly complain."

Pomeroy's Eq. Juris., 2nd ed., Vol. 5, section 2088, announces the principle as follows:

"It is not the province of equity to correct mere technical wrongs. A party seeking its aid must show some substantial injury. It frequent-

ly happens that a judgment is obtained by fraud, accident, or surprise, although the same result would be reached if an adversary trial had been had. In such a case the defendant at law is equitably bound to pay the amount of the judgment, and equity will not interfere to relieve him. The fraud, accident, or surprise is, in such a case, a mere technical wrong."

In *Bigby* v. *Powell,* 25 Ga. 244, 71 Am. Dec. 168, the court said:

"Again, to be entitled to the relief sought, the party must show, not only that he was misled and deceived, but that he was damaged thereby. If no damage resulted from the fraud, he is entitled to no relief."

—26 Corpus Juris, p. 1167;

Walcott v. *Wise,* 130 N. E. 544;

McNair v. *Toler,* 21 Minn. 175;

Little Rock & H. S. W. R. Co. v. *Newman,* 84 S. W. Rep. 727;

Mass. Benefit Life Ass'n v. *Lohmiller,* 74 Fed. Rep. 23;

Vanfleete's Collateral Attack, Sec. 553;

Meikel v. *Boarders,* (Ind.) 29 N. E. Rep. 29.

In *Rock, etc., Ry. Co.* v. *Wells,* 61 Ark. 354, 54 Am. St. Rep. 216, the Supreme Court of Arkansas said:

"It is said that the trial court committed error in impaneling, and also in charging, the jury. But errors alone are not sufficient to warrant the interposition of the court of equity. It must clearly appear that it would be contrary

to equity and good conscience to allow the judgment to be enforced, else equity declines to impose terms upon the prevailing party."

To the above opinion of the Supreme Court of Arkansas, Mr. Freeman, in 54 Am. St. Rep. 222, attaches a long and exhaustive annotation. The annotator announces the rule as follows:

> "It is not sufficient, in a suit for relief against a judgment or other decision, to show that it was procured by fraud or was due to surprise, mistake, accident, or some other ground for the interposition of equity, *if the defendant has suffered no injury from it,* or if the same decision must have resulted had there been a trial of the cause upon the merits. Whatever be the ground for relief, the defendant must, in addition, show that the judgment or decision of which he complains is *unjust.* If, being a plaintiff, he had no cause of action, or, being a defendant, he had no just ground of defense, but some wrong was done him during the prosecution of the action whereby a judgment was entered wrongfully or even fraudulently, he will be left to his legal remedies, if any he has. Therefore, in every bill seeking relief against a judgment, *merit* on the part of the complainant must be shown, otherwise it will not be deemed sufficient to call for the interposition of the extraordinary remedies and powers of equity."

The annotator cites a long list of authorities in support of this well settled rule.

In *Shultz* v. *Shultz,* 36 Ind. 323, 43 Am. St. Rep. 325, the court said, in regard to a judgment:

"It imports that it was just, equitable, lawful and right, to set aside the appellant's deed and subject the property to sale to pay the debts of her husband, with absolute verity. That being true, for the purposes of this case it makes no difference how wicked the conspiracy was that is charged against all the parties to bring about that result, as the result was just, right, and lawful, the conspiracy and evil acts charged *did not harm appellant,* did not deprive her of any legal right, and, therefore, no ground to complain is shown."

In *Hartford Fire Ins. Co.* v. *Meyer,* 30 Neb. 135, 27 Am. St. Rep. 385, the court said:

"It will be observed that there is no statement of facts showing the nature of the defense of the plaintiff against the payment of the loss. This was necessary in order to entitle the plaintiff to relief. Where a court of equity proceeds to set aside a judgment at law, it proceeds upon equitable consideration only. If the judgment rendered is not inequitable as between the parties, no matter how irregular the proceedings may be, a court of equity will not interfere."

In *Massachusetts Benefit Life Ass'n* v. *Lohmiller,* 74 Fed. Rep. 23-28, the Circuit Court of Appeals of the United States for the Seventh Circuit said:

"The rule is invariable that equity will not enjoin a judgment procured through fraud or artifice unless the complainant can aver and prove that it had a good defense upon the merits."

The court cites and approves the language of Chief Justice DIXON, in *Ableman* v. *Roth*, 12 Wis. 81, as follows:

> "Courts of equity will not interfere to grant a new trial where no substantial right has been lost, and no unfair advantage gained, simply because, *by some trick or artifice*, a judgment which is just or equitable in itself has been obtained in advance of the time when it would otherwise have been rendered."

One of the strongest cases sustaining the rule here invoked is the opinion of the Supreme Court of the Territory of Oklahoma, in *Hockaday* v. *Jones*, 56 Pac. Rep. 1054. After citing a long list of authorities in support of the conclusions of the court, the principles are embodied in the syllabus prepared by the court as follows:

> "*1.* A judgment rendered against a defendant by default upon constructive service by publication, in an action for goods sold and delivered —there being no personal service, and no appearance of the defendant—is absolutely void, where, at the time of the commencement of such action and of the making of such publication the defendant was a resident of the territory, and, by due diligence, summons could have been personally served upon him.
>
> "*2.* A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, cannot maintain an action to enjoin an execution on said judgment, or to annul such judgment, unless he makes it appear, both from

his pleadings and proof, *(1)* that he has a meritorious defense to the cause of action on which the judgment is based; *(2)* that he has no adequate remedy at law; and *(3)* that the existence of such judgment is in no wise attributable to his own neglect."

In *Wilson* v. *Shipman,* 34 Neb. 573, 33 Am. St. Rep. 660, the court said:

> "But there is another reason why the judgment should be reversed. The principal object of vacating a judgment is to permit an opportunity for a full examination of the matters in controversy; therefore, if the defendant ask to have a judgment against him set aside, he must allege, and if necessary prove, that he has a valid defense to the action. In *Gerrish* v. *Hunt,* 66 Iowa 682, it is said: 'This relief (by injunction) will not be granted if it appear that the party holding such void judgment has a valid claim whereupon it was rendered, to which there is no defense. The general principle underlying the jurisdiction is that it must be against conscience to execute the judgment sought to be enjoined. Therefore, if there is no evidence of a defense on the merits, or that the judgment is contrary to equity and good conscience, it will not be enjoined.' High on Injunctions, Sec. 86; *Ableman* v. *Roth,* 12 Wis. 90."

There must not only be fraud, but there must be damage or injury. No matter how dark and devious the conspiracy may be; no matter that the conspiracy accomplishes its purpose; no matter that its purpose was accomplished by wrongful means—that

is, by trickery and schemes—yet the party seeking to invoke the jurisdiction of equity to set aside the judgment must show affirmatively, both by his pleadings and the proof, that he suffered injury on account of the judgment. He must show that he has suffered damages.

In other words, it must be shown that it would be inequitable and unjust for the judgment to be enforced. If the party seeking to invoke the jurisdiction of equity to set aside a judgment obtained by fraud has no merit in his defense, then he will be denied relief, no matter how much fraud was perpetrated in obtaining the judgment. Likewise with respect to contracts.

In an extensive annotation to the case of *Felt* v. *Bell,* decided by the Supreme Court of Illinois in 1903, and reported in 10 Am. & Eng. Dec. in Equity, p. 35, the learned annotator lays down the rule as follows and supports the same with a large number of cases, to-wit:

> "In order to justify the cancellation of an instrument, it must appear that some injury to the complainant has been done, or is threatened. While a court of equity, in a proper case, has full power to order the cancellation of bonds, or other written instruments, yet, before this power will be exercised, it must be made to appear that a necessity exists to prevent an irreparable injury, which a court of equity alone can avert."

ILLUSTRATIVE CASES.

In *Snyder* v. *Hegan*, 40 S. W. Rep. 693, the Court of Appeals of Kentucky refused to rescind a contract between partners and a purchaser of their business, although one of the partners had made one of the joint purchasers a present of $3,000.00, to be credited on his part of the contract price. The court held that the goods were worth the $15,000.00, and that, therefore, the joint purchaser complaining was not injured, although the other purchaser had received a gift of $3,000.00 from the seller—the said $3,000.00 to be credited on his part of the purchase price. The party receiving the $3,000.00 was not complaining in the litigation, but the other purchaser was seeking a rescission. The court refused to grant the relief, and said:

> "Fraud without damage or damage without fraud, gives no cause of action."

In *Belmont Mining & Milling Company* v. *Costigan*, 42 Pac. Rep. 647, the Supreme Court of Colorado said:

> "We have examined the complaint with some care, and find it contains a sufficient statement of a cause of action for the rescission of the contract, with the exception that it does not state with sufficient particularity that the plaintiff was legally damaged by the alleged misrepresentations and deceit of the defendants. In such an action there must be alleged 'the telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition,

and his altering his condition in consequence, *whereby he sustains damage'.*"

In *Cunningham* v. *Shields*, (Tenn.) 4 Heywood 299, the Supreme Court of Tennessee said:

> "Fraud, to be relieved against, must be operative. It is not sufficient to say that an act was done with fraudulent intent. It must in its effect be injurious to the complaining party; otherwise it is not entitled to relief."

In *Marringer* v. *Dennison*, 20 Pac. Rep. 391, the Supreme Court of California, in refusing rescission of a contract sought to be set aside on the charge of fraud in the substitution of one kind of property for another, said:

> "The value of the property alleged to have been substituted is not stated, nor are there any facts alleged from which it can be inferred that it was of any less value than that originally contracted for. Therefore, no damage is shown that could have been the result of the fraud charged. It is true, the complaint alleges that the property first contracted for increased largely in value, and was worth more than that which plaintiff was to convey to defendant; but the same may have been true of the property embraced in the second agreement. If so, the plaintiff was not injured by the fraud alleged."

In a suit to set aside a contract on account of fraudulent representations, the Supreme Court of California, in *Bailey* v. *Fox*, 20 Pac. Rep. 871, said:

> "In other words there is nothing in the complaint to show that the plaintiff was in any

way injured by the representations, admitting them to have been false. The findings make no better case for the plaintiff than the complaint. *In order to entitle a party to rescind a contract, he must not only show the fraud, but that as a result thereof some damage has resulted to him.*"

This same doctrine is announced by the Supreme Court of the United States in *Ming* v. *Woolfolk*, 116 U. S. Rep. 599, 29 L. ed. 740. See, also:

Bispham's Equity, 5th ed., Sec. 217;
Carvill v. *Jack's Adm'r*, 43 Ark. 454;
Lewis v. *Cobbin*, 81 N. E. 248 (Mass.);
Bailey v. *Oatis*, 85 Kan. 339, 116 Pac. 830.

POINT FOUR.

The signing and executing of the lease by J. J. Eaves, as curator of Allie Daney, although the name of J. J. Eaves does not appear in the body of the lease, made it a valid lease from J. J. Eaves, curator.

Counsel for the appellant are mistaken in their contention that either the Oklahoma Supreme Court or the weight of authority holds that a lease or deed is void as to a party signing it unless the name of such party is set forth in the granting or demising clause of the instrument. There are some authorities apparently holding that the name of the grantor or lessor must appear in the granting or demising clause, but an analysis of the cases shows that the true rule is this:

> ***"If from the deed or lease in its entirety enough is shown from which, by the aid of extrinsic evidence, the name or names of the lessors or grantors can be made certain, then the lease or deed is binding on the party signing it."***

In other words, it is not necessary that the name "J. J. Eaves" appear in the body of the lease. The lease (Rec., p. 16) does not purport to be made by Allie Daney or by a competent lessor. It purports on its face to be made by a representative of the allottee, to-wit, a guardian. It is true the clause in the lease reciting the parties, not the demising clause, names A. N. Thomas as guardian, but anyone examining the lease would at once discover that it was not made by Allie Daney in her own right, but made by a representative—a guardian—and this appears not only in the clause reciting the parties, but appears from the names signed to the lease, to-wit, A. N. Thomas, guardian, and J. J. Eaves, curator. Eaves did not sign his name individually but in his representative capacity and *it is obvious from the face of the lease that there was a question as to who was guardian—a question as to who had authority to represent Allie Daney—and therefore two parties signed as her representatives.*

Lowery v. *Westheimer*, 58 Okl. 560, 160 Pac. 496, relied upon by appellant's counsel, expressly holds that extrinsic evidence is admissible to show whether or not a party executing a deed was bound thereby as a grantor, and among other things said:

"In *Otis* v. *Pittsburgh Westmoreland Coal Co.*, 199 Fed. 87, 117 C. C. A. 598, the United States Circuit Court of Appeals for the Third Circuit said:

> 'When in the performance of a written contract both parties give it a practical construction, before any controversy has arisen in regard thereto, such construction, rather than its literal meaning, will prevail; for, as Lord Chancellor SUDGEN, in *Attorney General* v. *Drummond*, 1 Dru. & Wal. 353, 366, affirmed 2 H. L. Cas. 337, said: "Tell me what you have done under a deed, and I will tell you what that deed means." Unless the language is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties, without coercion, have themselves acted upon. *District of Columbia* v. *Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. ed. 526; *Lowrey* v. *Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 51 L. ed. 1026; *Davis* v. *Alpha Portland Cement Co.*, 142 Fed. 74, 76, 73 C. C. A. 588; *Chicago G. W. Ry. Co.* v. *Northern Pacific Ry Co.*, 101 Fed. 792, 795, 42 C. C. A. 25; *Manhattan Life Ins. Co.* v. *Wright*, 126 Fed. 82, 87, 61 C. C. A. 138; *Central Trust Co. of N. Y.* v. *Wabash, St. L. & P. Ry. Co.*, (C. C.) 34 Fed. 254.'

"In *Old Colonial Trust Co.* v. *Omaha*, 230 U. S. 118, 33 Sup. Ct. 972, 57 L. ed. 1410, the court said:

> 'Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time be-

fore it comes to be the subject of controversy, is deemed of great, if not controlling, influence.'

"In *American Soda F. Co.* v. *Gerrier's Bakery*, 14 Okl. 258, 78 Pac. 115, 2 Ann. Cas. 318, we said:

'Where a written contract contains provisions which render it uncertain or ambiguous, the court may ascertain and give effect to the mutual intention and understanding of the contracting parties.'

"And in *Rider* v. *Morgan*, 31 Okl. 98, 119 Pac. 958, we said:

'Where the meaning of the terms used in a written contract is not clear, the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court'."

Devlin, the leading and standard authority on Deeds, 3rd ed., Vol. 1, section 204, says:

"The question whether a person who signs a deed, but is not named in it as grantor, is bound by it, should, in the author's judgment, *be one of construction*, to be determined by reference to the circumstances connected with the transaction, rather than by a fixed and arbitrary rule of law. In several of the cases that have been cited in the preceding sections, the decision of the court was based upon the ground that a wife could not relinquish her right of dower, unless the conveyance contained apt words expressive of such an intent, and that by merely signing a deed in which she was not

mentioned, her claim of dower remained unaffected. Possibly, a distinction can be drawn between such cases and cases where the party signing was under no disability. *The general rule for construing all contracts is that if it appears by a contract that a party intends to bind himself, trivial inaccuracies will be disregarded, and, if the intention of the parties can be ascertained, courts will effectuate that intention. Now, if a party signs a deed, he must do it for some purpose.* It is in practice the general custom for deeds to be drawn by others than the parties to them. The scrivener may have omitted the name of the grantor, or by mistake may have inserted a wrong name. If such should be the case, and a party should sign a deed, intending to bind himself, all parties supposing he had executed an effectual conveyance, is it reasonable to say that the deed is nugatory because the party signing was not named in the conveyance? *The fact that he signs and delivers the deed should be entitled to greater consideration in determining whether he intended to convey his title, than the writing of his name in the deed by some one else.* It has been objected to this view, that the relations between the parties are to be determined from the language of the deed, and if that shows an intended contract between a party who does not execute the instrument, the party who does sign cannot be bound, because he is, so far as the deed itself evinces the intention of the parties, a person with whom no contract was intended to be made. But assuming that such an instrument shows that the contract was originally intended to be made between certain persons, and that is all that can be claimed, such an intention may

subsequently have been altered. If the name of the party originally mentioned in the deed should be erased, and the name of the party signing substituted, there can be little question that the party whose name was substituted, and who executed the instrument, would be firmly bound by the instrument. If he signs the instrument, though his name is not substituted or mentioned at all in the deed should not some effect be given to his act? We think so. While it may well be that in such a case he should not be conclusively bound, yet we think that by his signature and delivery of the deed, he should be held presumptively to have assented to its provisions; or, at all events, that his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning."

Underhill on Landlord and Tenant, Vol. 1, section 238, says:

"The rule of the law of contracts that the parties to the contract must be certain or ascertainable is applicable to written leases. The general rules of law relating to the parties to a written contract require they should be either expressly named or indicated in such a way that their identity can be ascertained. Hence, if the parties to a written contract do not appear designated in the instrument itself, and if there is nothing in the transaction which shows who they are, the writing is void. Hence, good practice requires the names of the parties to the

lease to be stated correctly and filled in the body of the instrument, but a mistake in the name, whether of the lessor or of the lessee does not invalidate the lease if the parties can be ascertained either from the other elements of the description or from parol evidence. So, a mistake in the name of a party, whether of an individual or a corporation, will not invalidate the lease. *And even omitting the name of the lessor from the granting clause of the lease may be disregarded if it can be ascertained who he is.* A misdescription of the lessee or lessor in a lease where neither party is *misled thereby does not render the instrument* invalid. Thus the word 'incorporated' inserted after the names of the lessors who were in fact partners in business, does not in any manner affect the binding character of the lease, where the lessors in signing the lease signed as partners and not as a corporation. Under such circumstances, the lessee would be absolutely protected in paying the rent to the lessors as though they were a firm and in taking receipts from them in that capacity. A contract which would include a lease, obtained in good faith in the name of the firm, would be valid though only one person constituted the firm. The omission from the lease of the individual names of the members of the two firms who are named in the lease as lessor and lessee is not material nor are they released from their individual liability as the partners may by a subsequent ratification make the lease binding on them to the same extent as though their names were written in it. Hence, it follows that a party whose name was intended to be in the instrument but which was omitted from it may, *by his subsequent conduct in ac-*

cepting benefits of it. become liable as a party to it."

In *Texas Pac. Coal & Oil Co.* v. *Patton,* 238 S. W. 202, the Texas Supreme Court, on March 8, 1922, reviewed the authorities on this subject, including *Agricultural Bank* v. *Rice,* 4 How. 225, and expressly held that it was not necessary for the name of the grantor or lessor to appear in the body of the instrument if there was enough in the body of the instrument to indicate, with the aid of extrinsic evidence, the name of the grantor or lessor. In that case the court said:

> "While it is necessary, under the authorities cited, that a person signing a deed should appear on the face thereof as a party thereto and a grantor therein, before such deed will be effective to convey his interest in the property described therein, *we do not think it is necessary that he should so appear by name.* In the case of *Creosoted Wood Block Paving Co.* v. *McKay,* 211 S. W. 822, 824, the Court of Civil Appeals for the Fifth District considered a mechanic's lien contract in which the grantors were designated as, 'We, A. C. McKay and wife, owners of the following described property.' The granting clause of the instrument was:
>
> > 'We, the undersigned, do hereby expressly confess, admit, give, and grant * * * the mechanic's, builder's, contractor's and materialman's lien on said premises.'
>
> "The testimonium clause was, 'Witness our hands, etc.' It was signed by both husband and wife and duly acknowledged. It was con-

tended that the instrument was void because the name of Mrs. McKay did not appear as a grantor on the face thereof. The court held it valid. We quote from the opinion in that case as follows:

> 'While the premises of the deed must disclose certainly who the grantors are, it does not, in our opinion, require in every event the name of the grantor to appear therein. None of the cases cited will support such construction. The rule, as we have shown, is that one who does not appear on the face of a deed to be a party thereto or whose name is not recited therein is not bound thereby. "The requirement of the rule is met if, from the deed in its entirety, *enough is shown from which, by the aid of extrinsic evidence, the names of the grantors can be made certain.*" *Sloss-Sheffield Steel & Iron Co.* v. *Lollar,* 170 Ala. 239, 54 South. 272. The quotation is from the Alabama Supreme Court, which enforces the rule invoked in the case at bar, and asserts, in our opinion a sound, just, and reasonable application of the rule.'

"In the case of *Blaisdell* v. *Morse,* 75 Me. 542, the Supreme Court of that state sustained a deed in which the grantors were not named, but were described as, '*We, the heirs and devisees of Sarah Stearns.*' The court, however, required some evidence that the signers were such heirs and devisees.

"In the case of *Sloss-Sheffield Steel & Iron Co.* v. *Lollar,* 170 Ala. 239, 54 South. 272, the court sustained a deed where the grantors were designated as 'Kessiah E. Adcock and *her*

heirs,' and held that, inasmuch as Mrs. Adcock was living, the language used could only mean that the other grantors were her children.

"In the case of *Frederick* v. *Wilcox,* 119 Ala. 355, 24 South. 582, 72 Am. St. Rep. 925, the court sustained a mortgage in which only plural pronouns were used instead of names, and the grantors were described and designated as 'the undersigned.'

"In the case of *Vasquez* v. *Texas Loan Agency,* 45 S. W. 942, the Court of Civil Appeals for the Second District sustained a power of attorney and conveyance of land in which the only designation of the grantor was the pronoun I. Substantially the same rule is announced and applied in the following cases: *Bowles* v. *Lowery,* 181 Ala. 603, 610, 62 South. 107; *Sheldon* v. *Carter,* 90 Ala. 380, 8 South. 63; *Withers* v. *Pugh,* 91 Ky. 522, 16 S. W. 277; *Ins. Co. of Tenn.* v. *Waller,* 116 Tenn. 1, 95 S. W. 811, 813, 115 Am. St. Rep. 763, 7 Ann. Cas. 1018; *Madden* v. *Floyd,* 69 Ala. 221.

"We think the correct rule on the issue under consideration is that announced by the Supreme Court of Alabama, and approved and adopted in *Creosoted Wood Block Paving Co.* v. *McKay, supra.*"

The misdescription of the grantor in the body of a deed or lease may be cured by extrinsic evidence to identify the grantor signing his correct name to the instrument. Thus the Supreme Judicial Court of Maine, in *Kelleher* v. *Fong,* 79 Atl. 466, had under consideration a lease where the lessor was named as

Eng Fong, and executed by Charlie Fong. The court said:

> "And the party mentioned in the lease as 'Eng Fong' is satisfactorily shown by the testimony considered in relation to the circumstances, to have been the same party who signed his name to the lease as 'Charlie Fong,' and the identical person who was then occupying the plaintiff's store in question, and who had for seven years been recognized by the plaintiff as her tenant in that building."

In *Montanye* v. *Wallahan,* 84 Ill. 355, the court said:

> "Objection is taken to this lease because of a variance in name, William W. Montanye being written in the body of the lease, defendant's true name being Wiley W. Montanye. The name signed is W. W. Montanye. The proof is, that the defendant signed the lease. It is his lease, then, and he is bound by it, *no matter by what name he may call himself in the body of the lease.*"

In *Julicher* v. *Connelly,* 102 N. Y. Supp. 620, the court held that a lease is not invalid because the word "incorporated" appeared after the names of the lessors who were partners when it is clear that none of the parties to the lease were misled thereby.

In *Hackett* v. *Marmet Company,* 52 Fed. 268, the Fourth Circuit Court of Appeals sustained a lease executed in the name of the Marmet Mining Company, although its correct name was Marmet Company. If extrinsic evidence is competent to re-

move an erroneous description of the grantor it certainly ought to be admissible to show a party executing an instrument intended to execute it as a lessor or grantor.

The Missouri Supreme Court in the recent case of *Driskill* v. *Ashley*, 167 S. W. 1026, reviewed the authorities on this subject and adopted and approved the New Hampshire decisions, and among other things said:

> "In *Elliot* v. *Sleeper*, 2 N. H. 525, the court said:
>
> > 'And, for the purpose of our present inquiry, it may be admitted that the usage, however diversified in its forms, always requires the husband and wife so far to join as to convey at the same time, on the same paper, and both in language suitable to pass the title of real estate. Whether this requisition has here been fulfilled is a question of some difficulty, on both authority and principle. It cannot be doubted that the signature, sealing, and acknowledgment of this deed by the husband, being on the same paper with those of the wife, and in the usual form, are in themselves sufficient. But it is objected that he is not named in the deed as a grantor, and that, without being so named, the deed is not his deed, and in respect to him is altogether inoperative. But it seems well settled that whoever signs and delivers an unsealed writing is bound by the promises contained in it, though his name may not appear on the paper, except in his signature. *Little* v.

Weston, 1 Mass. 156; *Fisher* v. *Leslie*, 1 Esp. Cases, 426. *This seems founded on the obvious and reasonable principle that such acts amount to an adoption of all which precedes the signature, and that no other legitimate cause for these acts can be assigned than a design to make all the promises, to which the signature is affixed, the promises of the subscriber.* • • • in sealed instruments, such as bonds and wills, the same principle applies and appears to be supported by numerous authorities.'

"The situation in that case was much as in the case at bar. The doctrine of the *Elliot* case was reaffirmed by the New Hampshire Court in *Woodward* v. *Seaver*, 38 N. H. 29, and both cases quoted from and their doctrines approved by this court in the *Peter* case, *supra*."

In *Roberts* v. *McIntire*, 84 Me. 362, 24 Atl. 867, the court said:

"There are certain elementary principles applicable to the construction of written contracts which are matters of such common knowledge and universal acceptance as to render the citation of authorities a profitless task. There are pregnant legal maxims which are the deductions of reason and the conclusions of common sense, approved by the wisdom of ages. But their practical application must, in some instances, be qualified or restricted by technical rules, which ascribe definite meanings to particular expressions, in order to secure uniformity and to enable parties to understand the effect of the language employed in contracts made or accepted by them. *All agree, however,*

*that it is the constant desire of the law to uphold a contract, rather than destroy it; to effectuate the intention of the parties, and not to defeat it. * * * But with respect to conveyances of real estate, courts in modern times have shown more consideration for the substance of the contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and wherever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect."*

Thus in *Sterling* v. *Park*, 58 S. E. 828, 13 L. R. A. (N. S.) 298, the Georgia Supreme Court had under consideration a deed in which M. C. Huntley was named as grantor and R. E. Park as grantee. The deed was signed and sealed by M. C. Huntley, W. H. Huntley, and the defendant. Neither W. H. Huntley nor the defendant was named in the deed as grantor. At the time the deed was executed the title to the land was in M. C. Huntley for life, with remainder to the other two parties signing the deed. The plaintiff contended that the deed was operative as a conveyance of the estate of all the signers, while on the other hand the defendant contended that as she was not named in the deed as a grantor it was not operative to convey her estate in remainder. The court fully discussed the form of deeds at common law, and pointed out the reasons why, under *modern conveyances*, the old rule requiring the name of all

the signers to appear in the body of the deed as grantors, in order to convey their interest or property, had become obsolete. The court sustained the deed as a conveyance of the interest of all the signers and said:

> "The point in the case has been before many courts of last resort, and there is much contrariety of opinion on the subject. We believe the rule to be that one who signs, seals and delivers a deed in which he is not named as grantor is nevertheless bound by these acts as a grantor. We think an examination into the *origin and reason* of the contrary doctrine will demonstrate the correctness of our conclusion. At common law a deed is defined to be a writing, sealed and delivered by the parties. Co. Litt. 171; 2 Bl. Com. 295. Lord Coke said: 'There have been eight formal or orderly parts of a deed of feoffment, *viz.: (1)* The premises of the deed implied by Littleton; *(2)* the *habendum*, whereof Littleton here speaketh; *(3)* the *tenendum*, mentioned by Littleton; *(4)* the *reddendum; (5)* the clause of warrantie; *(6)* the *in cujus rei testimonium*, comprehending the sealing; *(7)* the date of the deed, containing the day, the month, the year and stile of the King, or of the years of our Lord; *lastly*, the clause of *hiis testibus.* * * * The office of the premises of the deed is twofold: *First*, rightly to name the feoffor and the feoffee; and, *secondly*, to comprehend the certaintie of the lands or tenements to be conveied by the feoffment either by expresse words or which may by reference be reduced to a certaintie.' 1 Co. Litt. 6a. Signing was not necessary to make a deed valid as such, at common law, and Sir William Black-

stone says that 'it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds "sealed and delivered" continues to this day; notwithstanding the statute 29, Car. II, chap. 3,' which requires deeds to be signed by the maker. 2 Bl. Com. 307. Not only could any seal be used, but 'a stick or any such like thing which doth make a print.' Shep. Touch. 57. 'In *Temes de la Leys* v. *"Fait,"* reference is made to a chapter of Edward III, of which the last two lines run in the English translation thus:

> And in witness that it was sooth
> He bit the wax with his foretooth.'

—Norton, Deeds, 6.

"Thus will be seen, from the conditions prevailing at common law, the prime importance of the grantor's name appearing in the body of the deed was to identify the deed as the act of a particular grantor. Without signature, and executed with a seal intended by the prick of a pin, or imprint of a tooth, the deed could not disclose the identity of the grantor, except by mention of his name in the grant. From the very necessity of the case grew the rule that the name of the grantor should appear in connection with apt words indicating that the deed was his grant. But even at common law a deed could be made in a very informal manner. Says Lord Coke: 'I have tearmed the said parts of the deed formal or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without premises, *habendum tenendum,* * * * the clause of *in cujus rei testimonium,* the date, and the clause of *hiis testabus,* yet the deed is good. For, if a man by deeds

give lands to another, and to his heirs, without more saying, this is good, if he put his seale to the deeds, deliver it and make livery accordingly.' 1 Co. Litt. 7a. Thus it would seem that the requirement of a deed made before the statute of frauds was, not that the grantor's name should appear in formal context, but, if the writing should identify the grantor, the deed would be considered his grant. Let us also recall the old common law distinction (obsolete in this state) between deeds poll and indentures. The former are those made by one person only. To the latter two or more persons are parties. The case of *Scudamore* v. *Vandenstene* (1579), cited in 2 Coke's Inst. 673, is grounded upon this principle. It was there held that a person could not take any immediate benefit under an indenture, or sue on any covenant contained therein, unless he was named as a party thereto. The statement of Lord Coke, in that case, that no grant can be made to a person not a party to the deed, was never true except of grants of immediate interest. Norton, Deeds, 24. And was never applied to deeds poll, but was limited to deeds *inter pares*. Norton, Deeds, 24; *Cooker* v. *Child*, 2 Lev. 74.

"The question first came up in America in the Massachusetts Supreme Court in 1812, in the case of *Catlin* v. *Ware*, 9 Mass. 218, 6 Am. Dec. 56. It was there held that a conveyance by a husband to which the signature and seal of the wife was affixed, but her name not being otherwise mentioned in the deed, did not bar the wife's right of dower. The conclusion of the court was rested on the reason that a deed cannot bind a party sealing it unless it contains

words expressive of an intention to be bound. Other courts have followed the Massachusetts court, either upon the authority of *Catlin* v. *Ware,* or the reason upon which the decision was placed. *Peabody* v. *Hewett,* 52 Me. 33, 83 Am. Dec. 486; *Purcell* v. *Goshorn,* 17 Ohio 105, 49 Am. Dec. 448; *Harrison* v. *Simons,* 55 Ala. 510; *Stone* v. *Sledge,* 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068; *Adams* v. *Medsker,* 25 W. Va. 127; *Cox* v. *Wells,* 7 Blackf. 410, 43 Am. Dec. 98; *Agricultural Bank* v. *Rice,* 4 How. 225, 11 L. ed. 949. Most of these decisions were based upon the ground that a wife could not relinquish her right of dower unless the conveyance contained apt words expressive of such intent. *But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization.* As was very pertinently said by WOODBURY, J., in *Elliot* v. *Sleeper,* 2 N. H. 525, decided as early as 1823; 'Here, however, a deed must, by statute, be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded; for "know," says Perkins, Sec. 36, "that the name of the grantor is not put in the deed to any other intent but to make certainty of the grantor." Bacon's Abr. "Brant" C. *This certainty is attained whenever a person signs, seals, acknowledges, and delivers an instrument as his deed, though no mention what-*

ever be made of him in the body of it, because he can perform these acts for no other possible purpose than to make the deed his own. In a deed poll, like that under consideration, where only the grantor speaks or signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound than in deeds indented.' In agreement with the New Hampshire case are *Armstrong* v. *Stovall,* 26 Miss. 275; *Ingoldsby* v. *Juan,* 12 Cal. 564, and *Hrouska* v. *Janke,* 66 Wis. 252, 28 N. W. 166. *Text writers now very generally discard as unsound the proposition that the grantor should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument.* 3 Washb. Real Prop. 2120; 1 Devlin, Deeds, Sec. 204.

"The requisites of a deed, under the Code, are that it must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or someone for him, and be made on a valuable or good consideration. No prescribed form is essential to the validity of a deed, and the instrument will be deemed sufficient if it make known the transaction. Civil Code 1895, sections 3599, 3602. We think that the deed under discussion measures up to these statutory essentials, and is effective as a conveyance of the defendant and her coremainderman, though their names are not mentioned in the body of this instrument. See, in this connection, *Ball* v. *Wallace,* 32 Ga. 170."

We call especial attention to the following remarks of the Georgia Supreme Court:

> "But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization."

The Supreme Court of Wisconsin in *Hronska* v. *Janke,* 66 Wis. 252, 28 N. W. 166, discussed this question and reviewed the authorities and holds that the deed reciting the names of six persons in the body of the deed as grantors, and signed by eight persons, operated to convey the interest and title of all the eight. The court said:

> "These cases, so far as we can ascertain the facts upon which they were decided, are distinguishable from the one at bar, and do not rule it. We are disposed to hold that the deed in question was effective as a conveyance of the interest of Henrietta Hover and Martha Hansen, though their names were not mentioned in the body of the instrument. Prof. Washburn says: 'It was once thought that the grantor should be named in the deed; but this does not seem to be necessary, if the grantor signs it.' 3 Real Prop. c. 4, Sec. 1, sub. 31."

See also:

Insurance Co. of Tennessee v. *Waller,* 116 Tenn. 1, 115 Am. St. Rep. 763;

Hargis v. *Ditmore,* 7 S. W. 141 (Ky.);

Runyan v. *Snyder,* 100 Pac. 420 (Col.)

Washburn on Real Property, 6th ed., Vol. 3, section 2120 is as follows:

> "*Of Grantor's Name in Body of Deed.*—It was once thought that the grantor should be named as such in the deed. But this does not seem to be necessary if the grantor signs it. Thus, where a deed purported to be that of a married woman, her name only appearing as grantor, but it was signed by her and her husband, who acknowledged it, it was held to be a good grant of the husband as well as the wife."

THE LEASE IS A CONTRACT.

In *Howard* v. *Manning*, 79 Okl. 165, 192 Pac. 358, 12 A. L. R. 819, the court said:

> "As said by the United States Supreme Court in *United States* v. *Gratiot*, 14 Peters 526, 528, 10 L. ed. 573, 579; 'The legal understanding of a lease for years is a contract for the possession of land for a determinate period with the recompense of rent.' *Raynolds* v. *Hanna*, 55 Fed. 783, 800; *Pelton* v. *Minah Consolidated Mining Co.*, 11 Mont. 283, 28 Pac. 310, 311. Tiedeman on Real Property, section 538, says: 'A lease is a contract between the lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. It becomes an estate when it takes effect in possession'."

That a lease is a contract was again held by the Oklahoma Supreme Court in *Papoose Oil Company* v. *Swindler*, ... Okl. ..., 221 Pac. 506.

The Oklahoma Supreme Court in *Gilcrease* v. *McCullough*, 63 Okl. 24, also followed this court's definition of a lease in *United States* v. *Gratiot*, 14

Peters 526, 10 L. ed. 573, and cited and quoted with approval other authorities to the same effect.

While a lease is a species of conveyance it is not, under modern practice, surrounded by the formalities and solemnities attending the execution of a deed. A lease will be construed by reference to extrinsic evidence for the purpose of ascertaining the meaning of the language used and *what the parties did under the lease*—the practical construction.

—*Lowery* v. *Westheimer,* 58 Okl. 560, 160 Pac. 496;

Otis v. *Pittsburgh-Westmoreland Coal Co.,* 199 Fed. 87-91;

Old Colonial Trust Co. v. *Omaha,* 230 U. S. 118;

Grant v. *Bannister,* 118 Pac. 255;

Yazoo & M. V. R. Co. v. *Lakeview Traction Co.,* 56 So. 395;

Warne v. *Sorge,* 167 S. W. 969;

Parks v. *Baker,* 143 Pac. 416;

In re City of Seattle, 100 Pac. 1015;

Bain v. *Tye,* 169 S. W. 843;

Abadie v. *Lee Lumber Co.,* 55 So. 658;

Warvelle on Vendors, Vol. 1, pages 361-365.

Oklahoma, following the trend of modern authority has adopted the liberal rule of construction for deeds. In *Smart* v. *Bassler,* ... Okl. ..., 223 Pac. 352, the court said:

"In earlier decisions much importance was attached to the language used in the different

> clauses of a deed, but the modern tendency is to ignore the technical distinctions between the various clauses and to ascertain, if possible, the intention of the grantor from the entire instrument without undue preference to any part."

Likewise, see, *Palmer Oil & Gas Co.* v. *Blodgett*, 60 Kans. 712, 57 Pac. 947.

EXTRINSIC CIRCUMSTANCES.

Schulte v. *Schering*, 2 Wash. 127, 26 Pac. 78, sustains the proposition that the omission from the granting clause of a lease of the name of one of the lessors is regarded as immaterial where the lessee has entered, paid rent and made improvements, and that fits the facts in this case exactly.

Appellant's counsel do not dissent from the following finding of fact made by the trial judge (Rec., p. 69), to-wit:

> "I find that at the time the lease was executed by J. J. Eaves as curator of the Allie Daney estate he was then and there the regular guardian of her estate, and that when he joined in the A. N. Thomas lease, *having first been specifically authorized to that end by the County or Probate Court of Love County, he was then and there the regular guardian of her estate and that when he acted in joining in the lease by executing it, Mr. Dana H. Kelsey, the Superintendent of the Five Civilized Tribes and representative of the Secretary of the Interior as to the initiation of such matters, that the same was done at his suggestion and that when J. J. Eaves as curator acted in joining in*

the execution of said lease and same was approved by the County or Probate Court of Love County, that this was done at the suggestion of said Dana H. Kelsey, Superintendent of the Five Civilized Tribes, and representative of the Secretary of the Interior; that by the act of the said J. J. Eaves as curator, and the authorization and approval of the County or Probate Court of Love County, placed the oil and gas legal title in Dunn and Gillam to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior, and afterwards the bonus fixed by the Secretary of the Interior through the Superintendent of the Five Civilized Tribes, to-wit: two thousand dollars was paid and said lease approved by the Secretary of the Interior."

Neither do appellant's counsel dissent from the following finding incorporated in the trial court's decree (Rec., p. 77), to-wit:

"*(5)* The court further finds that when J. J. Eaves, curator of the estate of Allie Daney, on or about the 26th day of January, 1914, subscribed his name to the oil and gas lease of date of August 19, 1913, by A. N. Thomas as guardian of Allie Daney to J. Robert Gillam and T. H. Dunn, said Eaves subscribed his name as curator, *it being the intention that said Eaves should so execute said lease,* in joining therein, as to execute a valid oil and gas lease and that was the then present intention on the part and so understood and that in so executing it, after it was approved by the County Court of Love County and by the Secretary of the

Interior, would operate to make said oil and gas lease a binding lease on the estate of Allie Daney, and that the execution by said J. J. Eaves, as curator and approval by the County Court of Love County, and by the Secretary of the Interior was free from fraud and the same operated to make said lease a valid lease, said lease being for a term of ten (10) years from the date of the approval by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, and covering the following described land, to-wit: (describing the 40 acres)."

The circumstances under which the lease was executed by Eaves, are conclusive that Eaves and all parties intended that Eaves should be the lessor, if as a matter of law, he was the legal guardian. That is clearly indicated from the face of the lease as well as conclusively shown by the circumstances. The lease as executed by Eaves was approved by the Secretary of the Interior and the assignment thereof to the Bull Head Oil Company likewise approved by the Secretary, all in accordance with the plan suggested by Mr. Kelsey, Indian Superintendent. Under these circumstances it would be utterly absurd to strike down this lease on the ground that Eaves was not a party thereto. The rule announced by the Third Circuit Court of Appeals in *Otis* v. *Pittsburgh-Westmoreland Coal Co.*, 199 Fed. 87-91, is exactly in point. The court said:

"When in the performance of a written contract both parties give it a practical con-

struction, before any controversy has arisen in regard thereto, such construction, rather than its literal meaning, will prevail; for, as Lord Chancellor Sudgen, in *Attorney General* v. *Drummond*, 1 Dru. & Wal. 353, 366, affirmed 2 H. L. Cas. 837, said: '*Tell me what you have done under a deed, and I will tell you what that deed means.*' Unless the language is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties, without coercion, have themselves acted upon. *District of Columbia* v. *Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. ed. 526; *Lowrey* v. *Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 51 L. ed. 1026; *Davis* v. *Alpha Portland Cement Co.*, 142 Fed. 74, 76, 73 C. C. A. 388; *Chicago, G. W. Ry. Co.* v. *Northern Pacific Ry. Co.*, 101 Fed. 792, 795, 42 C. C. A. 25; *Manhattan Life Ins. Co.* v. *Wright*, 126 Fed. 82, 87, 61 C. C. A. 138; *Central Trust Co. of N. Y.* v. *Wabash, St. L. & P. Ry. Co.*, (C. C.) 34 Fed. 254."

See page 75 of this brief wherein we quote from the Oklahoma Supreme Court's opinion in *Lowery* v. *Westheimer*, 58 Okl. 560, 160 Pac. 496.

POINT FIVE.

As said by Lord Camden in *Smith* v. *Clay*, 3 Brown Ch. 646, "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence," and under that rule the United States cannot in good faith and with clean hands now be heard to insist that Eaves' execution of the

lease was a nullity because his name failed to appear in the granting and demising clause.

It must be remembered that Mullen surrendered the lease executed to him by Eaves as curator on August 18, 1913, in consummation of a compromise agreement suggested, and we might say coerced, by the Indian Superintendent. It was the Indian Superintendent who suggested that either Thomas join in the Eaves lease or Eaves join in the Thomas lease. As a matter of expediency it was decided to have Eaves execute the Thomas lease because Mullen's lease from Eaves not only covered the 40 acres involved but 90 acres additional. Mullen was not to surrender his lease from Eaves insofar as it covered the other 90 acres of Allie Daney's land. The Bull Head Oil Company became the assignee of this lease and the owner thereof and therefore the only party entitled to have it reformed. The Court of Appeals inadvertently stated in its opinion (last paragraph, Rec., p. 264) that "there were no pleadings by any of the defendants asking the court to reform the lease in that respect, but at the time the court announced its conclusion and directed that the complaint be dismissed, the defendants in open court moved for reformation and correction, which was denied, and from that the defendants took a cross-appeal." In this the Court of Appeals was inadvertently in error because the defendant, Bull Head Oil Company, had long prior to a decision in the case amended its answer and cross bill so as to ask for

reformation. The final decree of the trial court (Rec., p. 75) shows that the case was heard at the October, 1919, term at Ardmore, and taken "under advisement until the ... day of October, 1920, * * * whereupon the court filed a memorandum opinion finding the issues in favor of defendants and cross plaintiffs and against the plaintiff," etc. This memorandum opinion of the trial judge was filed on October 27, 1920 (Rec., p. 70). Prior thereto and on the 26th day of April, 1920, the defendants, Bull Head Oil Company, Mullen, Dunlap, Hamon, Russell and Adams moved the court for leave to amend their joint and separate answers so as to add thereto paragraph No. 6. Paragraph No. 6 is contained in the order of the court made and entered on April 26, 1920 (Rec., p. 64). This amendement avers the execution of the lease by Eaves and that it was the intention of all parties that he should be the lessor therein; avers that by mutual mistake Eaves' name was omitted from the granting clause, etc., and then prays for a decree of reformation "so as to incorporate in the body thereof the name 'J. J. Eaves, curator of Allie Daney, a minor'," etc. (Rec., p. 65). Thereafter and on December 7th, 1920, appellant's counsel filed a motion for additional findings of fact (Rec., p. 70) and thereafter and on the 7th day of June, 1921, the court rendered its decree (Rec., pp. 75-79). On December 2, 1921, the defendants, Bull Head Oil Company, Mullen, Adams, Ketch as administrator of Jake L. Hamon, McCain, Russell, Dol-

man, Dunlap, and defendants T. H. and N. E. Dunn and J. Robert Gillam and wife, prayed and obtained an appeal to the Eighth Circuit Court of Appeals and filed their assignments of error to the effect that the trial court was in error in not reforming the lease so as to incorporate in the granting clause thereof the name of J. J. Eaves, as curator, etc. Thereafter and on August 22, 1921, the Bull Head Oil Company submitted to the Attorney General of the United States an offer to compromise. This offer was embodied in a letter and subsequently a compromise contract was drafted and executed September 6, 1921, and approved by the Assistant Secretary of the Interior on October 15. 1921, and by W. T. Riter for the Attorney General on September 22, 1921 (Rec., pp. 256-258). Under this compromise agreement the Bull Head Oil Company paid to the Indian Superintendent $45,000.00 and to W. A. Ledbetter, Special Assistant Attorney General a fee of $12,-500.00.

The opinion of the court of appeals was filed on March 28, 1923, and judgment of that court entered on the same date. Appellant waited until almost the end of the three months' time allowed by law to appeal and then on June 23, 1923, prayed and obtained an appeal to this court (Rec., p. 267). The assignment of errors was filed in the court of appeals on June 25, 1923, but the citation was not served on any of the defendants until after the three months' time had expired within which to appeal. *The Bull*

Head Oil Company had compromised the case and was out of it. The title to the lease, both legal and equitable, was in the Bull Head Oil Company, and not in its stockholders and this being true its stockholders could not appeal from the judgment of the court of appeals. But if they could have appealed the Government very carefully delayed its appeal until just before the expiration of the three months allowed by law and did not give any notice to the defendants until after the three months had expired. Under these circumstances the defendants could not file a cross appeal. Certainly when the Government compromised the case with the Bull Head Oil Company, assignee of the lease, and thereby eliminated the Bull Head Oil Company as a party, it is extremely inequitable on the part of the Government to now insist that Eaves' execution of the lease was a nullity. That contention does not come with very good grace and ought to be ignored. It smacks too much of whipsawing Dunn and Gillam.

ESTOPPEL.

Defendants are not estopped to deny the authority of Atha N. Thomas to act as guardian of Allie Daney.

Appellant in its brief, page 65, relies upon section 5247, Oklahoma Comp. Laws, 1921, declaring that "Any person or corporation having knowingly received and accepted the benefits or any part there-

of of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud." This lease was executed by Thomas and by Eaves and accepted by the Indian Superintendent and recommended by him to the Secretary for approval and approved by the Secretary with the definite understanding that either Thomas or Eaves was the legal guardian and the other not. That was left open for judicial determination when required. The compromise agreement shows that on its face. That is supported by the testimony of Kelsey, the Indian Superintendent, in his letters and reports to the Indian Commissioner and the Secretary. Dunlap testifies (Rec., p. 164):

> "At the time this contest was pending before the Department at Muskogee in Mr. Kelsey's office and as a part of the compromise arrangement, it was understood that the conflicting guardianships were to be extinguished, and following up the agreement Eaves filed his report and was discharged as curator in Love County—Eaves resigned."

Section 5247, Oklahoma Comp. Laws, 1921, has no application to this case. It applies to the relation between principal and agent and contracts made by the principal for himself and accepts benefits thereunder. Where the principal receives and

accepts benefits under the conveyance, mortgage or contract, he is estopped to deny the authority of the agent. Appellant's position would lead to this absurd situation: *(1)* Thomas having executed the lease as guardian the lessees are estopped to deny Thomas was guardian; and *(2)* Eaves having executed the lease as guardian the lessees are likewise estopped to deny his authority. There can be no such repugnant estoppel as that.

Injury is a necessary element of a valid estoppel and neither the appellant nor its ward, Allie Daney, is injured by showing that Thomas had no authority, nor is the lessee injured.

4 Am. & Eng. Dec. in Eq., page 289, citing a great many authorities, lays down the following rule:

> "The last requisite of a valid estoppel is, that the party who claims it must either have been injured by the course he has adopted in reliance upon the representations or conduct of the other, or that he has been induced to change his position, or incur liability to such an extent that it would be inequitable to allow the latter to allege a state of facts contrary to that in which he has led the former to believe; and if there has been no substantial *injury* or change of position, the estoppel is not made out."

21 C. J., page 1135, says:

> "In order to create an estoppel *in pais* the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced

to alter his position for the worse in some material respect. As otherwise expressed, where no available right is parted with and no injury suffered there can be no estoppel *in pais*. And *a fortiori*, an act clearly beneficial to the person setting up the estoppel cannot be relied on. In the absence of injury, it is of course immaterial that the other elements of estoppel are present."

ATHA N. THOMAS, AS GUARDIAN.

We will now discuss the case on the assumption Atha N. Thomas was the legal guardian and that Eaves was not. This brings on for consideration our 7th, 8th, 9th, 10 and 11th points of law, which are as follows:

(7) That upon the discovery of the alleged fraud the United States had one of two remedies, to-wit: *(a)* An action in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc.; or *(b)* an action for damages to recover the value of the lease at the time it was fraudulently obtained.

(8) That the plaintiff cannot have both of these remedies and was required to elect which remedy it would pursue, and having elected to pursue the remedy in equity for rescission, it is bound thereby.

(9) That having elected to sue in equity for the rescission and cancellation of the lease, the compromise with the Bull Head Oil Company, the assignee

and owner of the lease, condoned all fraud and extinguished the cause of action in its entirety, without regard to the doctrine of joint tort feasors and therefore left the Government with no cause of action for damages against Dunn or any of the other parties.

(10) That by the compromise of this case while pending in the Court of Appeals the appellant lost all equities in that it appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Company and certain of its stockholders whereby certain stockholders, with the consent and approval of the appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, were not allowed to participate.

(11) That if the compromise with the Bull Head Oil Company, the assignee and owner of the lease, did not enure to the benefit of Dunn and Gillam as stockholders, the measure of any recovery against Dunn and Gillam is the value of the lease at the time it was executed on August 18, 1913, and full value having been paid to the Indian Superintendent and received by the Indians, there is nothing to recover in this suit.

PRELIMINARY POINT.

The appellant was guardian of Allie Daney, the full-blood Indian, and had full power to compromise this case, especially with the approval of the Court of Appeals, which was given.

In *Tiger* v. *Western Investment Company*, 221 U. S. 286, this court denominated the relationship between the United States and the full-blood Indian as that of guardianship and ward, and said that "it rests with Congress to determine when its guardianship shall cease."

In *United States* v. *Kagama*, 118 U. S. 375-384, this court said: "These Indian tribes are the wards of the Nation." Not only is the United States guardian of the tribe, but is likewise guardian of the restricted full-blood Indian.

—*Heckman* v. *United States*, 224 U. S. 413;
Goat v. *United States*, 224 U. S. 459;
Privett v. *United States*, 256 U. S. 201;
Bowling v. *United States*, 233 U. S. 528-535;
United States v. *Bowling*, 256 U. S. 484;
Brader v. *James*, 246 U. S. 88.

As the guardian of the Indian the appellant has plenary control over the litigation, its representation of the Indian being complete in every essential and recognizing "no limitations that are inconsistent with the discharge of the national duty."

Thus in *Heckman* v. *United States,* 224 U. S. 444, this court said:

> "The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be *no more complete representation than that on the part of the* United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it *recognizes no limitations that are inconsistent with the discharge of the national duty.*
>
> "When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. *It was not necessary to make these grantors parties,* for the Government was in court on their behalf. Their presence as parties could *not add to,* or *detract from,* the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the Act of Congress

they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from *its complete* representation by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit." (Italics ours.)

The appellant, being vested with complete authority to institute the suit and control the litigation, has the concomitant power to compromise the case.

—*Thompson* v. *Maxwell Land Grant & Railway Co.*, 168 U. S. 451;
Gusdofer v. *Gundy*, (Miss.) 16 So. 432;
Cannon v. *Hemphill*, 7 Tex. 184;
Gunter v. *Fox*, 51 Tex. 383;
Hollis v. *Dashiell*, 52 Tex. 187;
Vedrine v. *Cosden & Co.*, (Okl.) 220 Pac. 329.

This brings us to a discussion of our conclusions of law, 7 to 11, inclusive, above set out.

SEVENTH CONCLUSION OF LAW.

That upon the discovery of the alleged fraud the United States had one of two remedies, to-wit:

(a) ***An action in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc., or*** **(b)** ***an action for damages to recover the value of the lease at the time it was fraudulently obtained.***

This point will not be disputed.

Black on Rescission and Cancellation, Vol. 2, section 561, says:

> "A contract induced by fraud, false representations, deceit, mistake, duress, or undue influence, or, generally, which is rescindable for any legally sufficient cause, is not, as a rule, void, but is only voidable. If the injured party chooses to abide by it, there is nothing to prevent him from doing so, and in that case the other party will be legally bound to fulfill the contract. On the other hand, if the injured party chooses to rescind the contract, he has the right to do so, and the contract will be thereby *abrogated for all purposes. He is therefore put to his election either to rescind the contract or to affirm it.*"

EIGHTH CONCLUSION OF LAW.

That the plaintiff can not have both of these remedies and was required to elect which remedy it would pursue, and having elected to pursue the remedy in equity for rescission, it is bound thereby.

This will hardly be disputed.

Black on Rescission and Cancellation, Vol. 2, section 561, says:

"But a person who is in a position where he can either affirm or rescind a contract *cannot to both.* He cannot treat the contract as rescinded for the purpose of escaping obligations under it, and at the same time treat it as subsisting for the purpose of claiming benefits, or for any reason treat it *as abrogated and as existing at the same time.* Thus, *a complainant in equity cannot, by his bill, attack an instrument as fraudulent and void for any reason, and at the same time assert rights under it if the court should hold it valid, but he must elect whether to claim under or against the instrument before bringing his suit.*"

The same authority, section 562, says:

"When a person is entitled either to rescind a contract for fraud or other cause or to affirm it and seek compensation for the injury it may have done him, his adoption of either remedy *will preclude all recourse to the other.*"

The same authority, section 563, says:

"A person who has the right either to rescind a contract to which he is a party or to affirm it and seek compensation in other ways for any injury he has suffered, and who has once made his election and announced it, *must abide by his choice.* He cannot be allowed to vacillate in his purpose or, having chosen one remedy, to abandon it and seek the other. * * * So, a party who has been led into a transaction by means of fraud may elect, if he so chooses, after acquiring full knowledge of the fraud, to affirm the contract, and after such election is once deliberately made, with full knowledge of the

facts *he will not be allowed to shift his position and seek a rescission.*"

This court, in *Shappirio* v. *Goldberg*, 192 U. S. 232, 48 L. ed. 419, said:

> "It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and *adhere to it.*"

The Government's bill is for cancellation and rescission and not for damages. The Government's bill nowhere affirms the lease, but seeks to have it rescinded and cancelled and alleges specifically (see paragraph 10, Rec., p. 9) "*that said corporation at all times had full notice and knowledge of the secret agreement entered into and the secret interest held and owned by the parties aforesaid in said lease as charged in paragraph No. VI-d hereof.*" The bill charges in the last sentence of the 12th paragraph (Rec., p. 14) that Adams, Mullen, Gillam and wife, and others "*received large sums of money therefrom either in the form of dividends paid by the corporation or in the form of proceeds of the sale of said stock to others, or both; that all such moneys were received by each and all of the defendants with full knowledge of the fraudulent character of the lease held by the Bull Head Oil Company,*" *etc.* The 10th paragraph of the bill (Rec., p. 9) alleges that Dunn and Gillam caused the Bull Head Oil Company to be organized and that Dunn, Gillam, Dolman, Dunlap and

Mullen, incorporators and directors, "*each and all were at the time of the organization of said corporation fully aware of said secret agreement set forth in paragraph VI-d hereof, and were informed of all the facts and circumstances connected therewith.*" The 12th paragraph of the appellant's bill (1st sentence, Rec., p. 12) alleges that Mullen paid nothing for his 8,000 shares in the Bull Head issued to him for the benefit of himself and associates and that "*he took same with full knowledge of the Funkhouser agreement shown in paragraph VI-d and with full knowledge of the deception practiced and perpetrated upon Superintendent Kelsey and upon the Secretary of the Interior, as alleged in paragraph VIII, and that his associates Jake L. Hamon, Errett Dunlap and F. N. Adams accepted and received their portion of said capital stock with full knowledge of said Funkhouser agreement and of the deception practiced and perpetrated upon said federal officials; wherefore, plaintiff alleges that the issuance of said stock and the transfer thereof was wholly illegal and void.*" So an examination of appellant's bill shows that this is a suit to rescind and cancel the lease and for a full accounting against the Bull Head and all of its stockholders for all the money received by them from the oil taken from the land, etc.

The 3rd paragraph of the prayer is for a decree that the defendants and each of them be decreed to have no right, title and interest in said land, or any

part thereof; the 4th paragraph prays for a judgment requiring the Bull Head Oil Company, Dunn and wife, Russell, Gillam and wife, Dolman, Dunlap, Hamon, McCain, Mullen and Adams to account for all oil and gas taken from said land and for the money received by them as the proceeds of said oil and gas taken from said land.

The 5th paragraph of the prayer is as follows:

> "That if for any reason the court shall hold that the lease described in paragraph V and shown in 'Exhibit A' cannot be cancelled, then plaintiff prays that the defendant stockholders be adjudged the holders of said stock respectively in trust for said Allie Daney, and that Allie Daney be declared the rightful owner thereof and that plaintiff be awarded the custody thereof for her use and benefit; that the defendant, the Bull Head Oil Company, be required to account for all the oil and gas taken from the said premises and for the proceeds thereof; and that the defendants who are or at any time have been stockholders of the Bull Head Oil Company be required to account for all moneys received by them respectively, either as dividends or as proceeds of sales of their stock."

The answer to this prayer is that the appellant cannot disaffirm and affirm the lease in the same suit. *To render a decree for all the stock or any part thereof belonging to any defendant stockholder is an affirmance of the lease.*

The above quoted 5th paragraph of the prayer seems to be based on an imaginary power of the court to do a thing indirectly that it possibly could not or would not do directly. Thus the court is asked to award a judgment against all the stockholders for the stock and an accounting against them and the Bull Head for oil and gas in the event "for any reason the court shall hold that the lease described in paragraph V and shown in 'Exhibit A' cannot be cancelled." Just why the court could give a judgment against all the stockholders for their stock, coupled with a judgment against the Bull Head and the stockholders for an accounting *and leave the lease in force, is a puzzle.* The point is that this is a suit to rescind and cancel the lease and for an accounting.

The bill does not allege that the Bull Head was a bona fide purchaser and therefore rescission and cancellation being impossible the plaintiff was entitled to damages or an accounting against the stockholders. Quite to the contrary because, as pointed out, the bill alleges specifically that the Bull Head and all the stockholders had full knowledge and notice of the alleged fraud. When the Government commenced this suit as a suit to cancel it is bound by its election and cannot have a judgment for damages or a judgment for the stock of any particular stockholder.

—*Wilson* v. *New United States Cattle-Ranch Co.*, 73 Fed. 994;

Shappirio v. *Goldberg*, 192 U. S. 232, 48 L. ed. 419;

Supreme Council, etc., v. *Lippincott*, 134 Fed. 824.

The appellant, with or without the written consent of some of the parties, can not change its action in the Court of Appeals—change its base—so as to ask for another and different relief against some of the parties not joining in the compromise. Although no judgment for damages is asked in the bill the compromise stipulation, paragraph 2 (Rec., p. 256), requires the appellant to waive all relief against the Bull Head and all the other stockholders except the Dunns and Gillams. By this provision in the compromise agreement it is expressly recited that the Government "will neither ask nor insist upon a reversal of said cause or a recovery against the Bull Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, *but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded.*" An amendment in the trial court asking for the relief the Government agrees now to ask for under the compromise agreement would have been denied.

Thus in *Shields* v. *Barrow*, 17 How. 130-146, 15 L. ed. 158, this court said "A bill may be originally framed with a double aspect, or may be so amended as to be of that character, but the alternative case stated must be the foundation for *precisely the same relief,*" etc. This court further said, in the same case, "Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment."

NINTH CONCLUSION OF LAW.

That having elected to sue in equity for the rescission and cancellation of the lease, the compromise with the Bull Head Oil Company, the assignee and owner of the lease, condoned all fraud and extinguished the cause of action in its entirety, without regard to the doctrine of joint tort feasors and therefore left the Government with no cause of action for damages or other relief against Dunn or any of the other parties.

After this case was appealed to the court of Appeals a compromise was entered into on the 6th day of September, 1921, between the Bull Head Oil Company and the United States whereby the Bull Head agreed to and did pay in installments to the Indian Superintendent for the benefit of Allie Daney the sum of $45,000.00, and also pay Mr. Ledbetter, Assistant to the Attorney General, a fee of $12,500.00. We are not here concerned with the law applicable

to a settlement and compromise effected with one joint tort feasor. Under the allegations of the appellant's bill the Bull Head Oil Company and all the officers and stockholders were joint tort feasors, but the trial court found that the Bull Head Oil Company and Mullen and his associates were bona fide purchasers.

This is not an action for damages for a joint wrong or tort, but a suit in equity to rescind and cancel a lease on the ground of fraud. Appellant had the right to elect whether it would rescind, or affirm the lease and sue for damages. The Government elected to disaffirm the lease and brought this action but after the case was appealed to the Circuit Court of Appeals the Government reversed its position and affirmed the lease. When the Government compromised this case it completely and irrevocably affirmed the lease—ratified it, and that ratification and affirmance relates back to the date of the lease and cures every defect therein.

Appellant can not affirm in part and disaffirm in part. The lease is an entirety and can not be rescinded as to a part of the parties and affirmed as to others. The lease being an entirety can not be split up by various suits to cancel against various interested defendants. While an injured party may sue ONE or ALL the joint tort feasors for damages, there can be only one suit to cancel a lease, and the compromise and settlement of the suit is an affirmance

and ratification of the lease as an entirety and terminates the cause of action against everyone. Thus, in Shields v. Barrow, 17 How. 130-146, 15 L. ed. 158, the court had under consideration a suit to rescind a compromise agreement and said, "The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others."

Thus Story's Equity Juris., 14th ed., Vol. 1, section 291, says:

> "In the next place the defrauded party may, by his subsequent acts with full knowledge of the fraud, deprive himself of all right to relief as well in equity as at law. Thus for example, if with full knowledge of the fraud he should settle the matter in relation to which the fraud was committed, and give a release to the party who has defrauded him, he would lose all title to legal and equitable relief. The like rule would apply if he knew all the facts, and with such full information continued to deal with the party.
>
> "(If one become advised of the fraud perpetrated upon him in season to recede from his engagement, and yet, with knowledge of the falsity of the representations which had induced the contract, elects to perform, and clearly manifests his intention to abide by the contract, *he condones the fraud and is without a remedy.* The contract. being against conscience because of the fraud, is not obligatory upon him, if he shall so elect; but if, when fully in-

formed of the fraud, he voluntarily confirms, ratifies and performs and exacts performance of the contract, he *condones the fraud, and such ratification, like the ratification of the unauthorized act of an agent, relates to the time of the contract, confirming it from its date and purging it of fraud.)*" (Italics ours.)

If with knowledge of the fraud the party exacts performance or performs himself he condones the fraud.

—*McLean* v. *Clapp*, 141 U. S. 429;
Grymes v. *Sanders*, 93 U. S. 55;
Burk v. *Johnson*, 146 Fed. 209;
Kingman v. *Stoddard*, 85 Fed. 740;
Simon v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 574.

As said in *Grymes* v. *Sanders, supra*, a party "is not permitted to play fast and loose." The appellant made its election when it commenced its suit in the District Court and *not when it appealed the case to the Court of Appeals.* A plaintiff need not receive any consideration for making the election —he simply has a choice of remedies and in this case appellant elected rescission. Now after the case got into the Court of Appeals the appellant elects to affirm, but this second election is supported by a consideration, to-wit, $45,000.00, plus $12,500.00 to appellant's attorney. This second election to affirm the lease purged the transaction of all fraud. The $45,000.00 and attorney fee was not paid as part satis-

faction for unliquidated damages, *but paid for the consummation and ratification of an alleged fraudulent lease, and that lease can not be affirmed and ratified in part and disaffirmed in part.* See 21 Corpus Juris, Sec. 209, page 1208.

TENTH CONCLUSION OF LAW.

That by the compromise of this case while pending in the Court of Appeals the appellant lost all equities in that it appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Company and certain of its stockholders whereby certain stockholders, with the consent and approval of the appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, also stockholders, were not allowed to participate.

As above pointed out, the 10th paragarph of the bill (Rec., p. 9), alleges that the Bull Head "at all times had full notice and knowledge of the secret agreement entered into and the secret interest held and owned by the parties aforesaid in said lease as charged in paragraph No. VI-d hereof," and that Dunn, Gillam, Dolman, Dunlap and Mullen, "the incorporators and directors thereof, * * * each and all were at the time of the organization of said corporation fully aware of said secret agreement set forth in paragraph No. VI-d hereof, and were informed of all the facts and circumstances connected there-

with." The appellant's bill (Rec., p. 12, 1st sentence) not only alleges that Mullen and his associates paid nothing for their 8,000 shares, but "took same with full knowledge of the Funkhouser agreement shown in paragraph VI-d, and with full knowledge of the deception practiced and perpetrated upon Superintendent Kelsey and the Secretary of the Interior, as alleged in paragraph VIII, and that his associates, *Jake L. Hamon, Errett Dunlap and F. N. Adams,* accepted and received their portion of said capital stock *with full knowledge* of said Funkhouser agreement and of the deception practiced and perpetrated upon said Federal officials," etc. The fourth paragraph of the prayer (Rec., p. 15) prays for judgment against the Bull Head, Dunn and wife, Gillam and wife, Russell, Dolman, Dunlap, Jake L. Hamon, McCain, Mullen and Adams, for an accounting for all oil and gas taken from the said land and the money received by them as the proceeds thereof.

On April 18, 1918, defendant, Jake L. Hamon, purchased the stock of Gillam and wife for a consideration of $75,000.00, part in cash and part in notes which were subsequently paid by Hamon (Rec., p. 146). But the compromise the Bull Head effected with the United States *was not made on behalf of itself and all of its stockholding defendants, but only on behalf of itself and a part of the stockholders* (Rec., p. 256). This compromise agreement seems to have originated with the Bull Head Oil Company,

as shown by a letter of August 22nd, 1921, dated Washington, D. C., addressed to the Attorney General of the United States (Rec., p. 256). This letter begins: "Sir: Referring to the conferences which have taken place between the Bull Head Oil Company and *its attorneys* and the Department of Justice with reference to the settlement of certain matters involved in the above case, the Bull Head Oil Company makes the following proposition:"

> *(Note:* This refers to a conference between the Bull Head and *its attorneys* and the Department of Justice. We take occasion here to say that neither Geo. S. Ramsey, nor his partners, Edgar A. deMeules and Villard Martin, counsel for the Bull Head in this case in the District Court, advised said compromise or had any notice or knowledge thereof until after it had been effected. The compromise having been effected their services were no longer needed by the Bull Head and Mr. Ramsey and his partners accepted employment by Dunn and wife to represent them in the Court of Appeals and in this court.)

The Bull Head's proposition submitted to the Department of Justice on August 22, 1921, for a settlement expressly recites in paragraph 2 thereof that "This proposition is made with the understanding that in any appeal which the United States may prosecute from the decision of United States Court for the Eastern District of Oklahoma in the above filed cause to the United States Circuit Court of Appeals or to the Supreme Court of the United

States, the United States will neither ask nor insist upon a reversal of said cause or a recovery against the Bull Head Oil Company or *against any of the defendants* in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon *any of the stock in Bull Head Oil Company* heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and *assigned to Jake L. Hamon,* but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded." *The Bull Head had the right and power to compromise the case for itself but no right to compromise it for itself and a part of its stockholders jointly sued with Dunn and Gillam, other stockholders.* That would be equivalent to a distribution of a part of the corporate assets to a part of the stockholders. Hamon had purchased the Gillam stock. Appellant sued him claiming he was not a bona fide purchaser and alleged that all the other stockholders were bad faith purchasers and asked for a judgment against all the stockholders. The compromise agreement requires the Government to abandon all claims against Hamon and the stock he purchased from the Gillams and in lieu thereof "insist upon a money judgment against them (the Gillams) for whatever amount the testimony may show should be awarded." *The Dunns are stockholders.* The expenditure of $57,500.00 to settle this case was a misappropriation of

corporate funds because it undertakes to settle for the company and part of its stockholders, excluding the other stockholders, the Dunns, from in any way sharing in the benefits of said appropriation. That is clearly an illegal diversion of corporate funds and a fraud on the Dunns. The Government certainly was advised of this condition as it openly entered into the contract of settlement. The compromise was unconscionable in that it amounted to a misappropriation of corporate funds—a preferential appropriation—an appropriation for the special benefit of part of the stockholders to the exclusion of other stockholders. That was a fraud. Although the authorities hold that the title of the corporation to its property is separate and distinct from the property of the stockholders, nevertheless, the stockholders are the ultimate owners of the corporation. On a dissolution they are entitled to everything above the debts. They are entitled to receive the dividends per share equally. The Bull Head could no more make this compromise and exclude a part of the defendant stockholders therefrom than it could declare a dividend to part of the stockholders to the exclusion of the Dunns. That is just common justice.

The compromise was in violation of section 5461, Oklahoma Compiled Laws of 1921, section 1360, R. L. 1910. That section prohibits mining and manufacturing corporations organized under the laws of

Oklahoma from appropriating its funds to any other purpose than that distinctly and definitely specified in the articles of incorporation, and prohibits the loaning of corporate funds to stockholders. This was more than a loan—it was a gift of corporate funds to certian favored stockholders.

The appellant, by entering into the compromise contract with the Bull Head whereby the corporate funds were to be used for the special benefit of a part of the stockholders to the exclusion of other stockholders, made itself a party to the fraud and cannot, with good grace, further prosecute this action by law or otherwise. The Government does not come into this court with clean hands.

Appropriate to this situation are the remarks of Judge SANBORN, speaking for the Eighth Circuit Court of Appeals, in *State of Iowa* v. *Carr*, 191 Fed. 257-266, to-wit:

> "But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.
>
> "The equitable claims of a state or of the United States appeal to the conscience of a

chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. *United States* v. *Stinson*, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. ed. 724; *United States* v. *Detroit Timber & Lumber Co.*, 67 C. C. A. 1, 10, 131 Fed. 668, 677; *United States* v. *Chicago, M. & St. P. Ry. Co.*, (C. C.) 172 Fed. 271, 276; *United States* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; *United States* v. *Stinson*, 125 Fed. 907, 910, 60 C. C. A. 615, 616; Herman on Estoppel, sections 676, 677; *State of Michigan* v. *Jackson, L. & S. R. Co.*, 16 C. C. A. 345, 351, 69 Fed. 116, 122; *State* v. *Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103, 106; *United States* v. *California & Oregon Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. ed. 354; *Carr* v. *United States*, 98 U. S. 433, 438, 25 L. ed. 209; *United States* v. *Walker*, (C. C.) 139 Fed. 409, 411, 412, 413; *United States* v. *Willamette Valley & C. M. Wagon Road Co.* (C. C.) 55 Fed. 711, 717; *Attorney General* v. *Central Railway Co.*, 68 N. J. Eq. 198, 59 Atl. 348. Thus a state is estopped from ousting a city organized under a *void law* after the city has been exercising its assumed powers for only four years, but has levied and collected taxes and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state, *State* v. *City of Des Moines*, 96 Iowa 521, 532, 533, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381. And a state is estopped from ousting a private corporation for illegality in its organization after a delay of a few years while the corporation

has been exercising, without objection on the part of the state, its assumed corporate powers, has been collecting and expending money and changing its financial relations to its stockholders and creditors in reliance upon the acquiescence of the state. *Commonwealth* v. *Bala & Bryan Mawr Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105; *State of Wisconsin* v. *Janesville Water Power Co.*, 92 Wis. 496, 66 N. W. 512, 515, 32 L. R. A. 391; *State* v. *Lincoln Street Ry. Co.*, 80 Neb. 333, 114 N. W. 422, 427, 14 L. R. A. (N. S.) 336; *State* v. *School District No. 108*, 85 Minn. 230, 88 N. W. 751; *Attorney General* v. *Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 1, 24; *People* v. *Alturas County*, 6 Idaho 418, 55 Pac. 1067, 1068, 44 L. R. A. 122; *Vermont* v. *Society for the Propagation of the Gospel*, 2 Paine (C. C.) 545, Fed. Cas. No. 16920. According to the decisions of the highest judicial tribunal of the State of Iowa a city may be estopped from claiming a street or an alley, or from maintaining the original lines thereof by acquiescing in the possession, occupation and improvement of it, or of a part of it, by a citizen who claims title thereto by possession and estoppel only. *Corey* v. *City of Fort Dodge*, 118 Iowa 742, 749, 92 N. W. 704. The same court holds that a like estoppel may arise against a city by its taxation of the property when the claimant in possession pays the taxes. *Smith* v. *City of Osage*, 80 Iowa 84, 89, 45 N. W. 404; 8 L. R. A. 633; Dillon Corporations, Sec. 533; *Audubon County* v. *Emigrant Co.*, 40 Iowa 460; *Page County* v. *B. & M. R. R. Co.*, 40 Iowa 520; *Austin* v. *Bremer County*, 44 Iowa 155; *Adams County* v. *B. & M. R. R. Co.*, 39 Iowa 507."

In *United States* v. *Walker*, (C. C.) 139 Fed. 409, 412, 413, 420, the court refused to sustain the claim, and said:

> "When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisdiction of the forum in like subject-matter between man and man."

ELEVENTH CONCLUSION OF LAW.

That if the compromise with the Bull Head Oil Company, the assignee and owner of the lease, did not enure to the benefit of Dunn and Gillam as stockholders, the measure of any recovery against Dunn and Gillam is the value of the lease at the time it was executed on August 18, 1913, and full value having been paid to the Indian Superintendent and received by the Indian, there is nothing to recover in this suit.

Appellant's 5th proposition (appellant's brief, page 67, etc.) assails the holding of the Court of Appeals that appellant having compromised the case thereby affirmed the lease and could recover no damage because none was proven. Appellant argues that the lease was worth $16,000.00 to $20,000.00 in January, 1914, at the time Eaves executed it and the Bull Head was organized. That is immaterial. The lease on *August 18, 1913*, was not worth over

the amount of bonus actually paid. Appellant cites no witness or evidence to the contrary.

Mullen (Rec., pp. 161-162) testifies that the lease, during the latter part of January, 1914, was worth about the capital stock of the Bull Head—that is, about $18,000.00—and then with respect to the value of the lease in August, 1913, says:

> "After the first well came in down here in August, 1913, we looked on it with suspicion —this was an agricultural community and we did not pay much attention right then; when the first well came in in this field I leased land right around there—*gave leases away;* I think I know the market value of this Allie Daney lease in August, 1913; the most I heard of was twenty dollars an acre on down to four or five dollars an acre; some of it didn't bring anything."

P. C. Dings (Rec., p. 158) says:

> "I was living in Ardmore in August, 1913; leases were selling at that time after the well came in, or about the time it came in, all the way from two to four and six and ten to twenty dollars an acre; I was offered a lease myself that afterwards was very productive for five dollars an acre and would not pay but three and they were very productive and I lost them."

Appellant quotes on page 70 of its brief the letter written by the Oil Inspector on December 22, 1913, to Superintendent Kelsey, recommending a bonus of $4,000.00, but the record shows that the Oil

Inspector revised his figures. On January 24, 1914, the Oil Inspector made a written report to the Indian Superintendent as follows (Rec., pp. 197-198):

"Copy Rec'd Union Agency Jan. 24-14 Encl. 4770. Lease No. 27965 Refer to H-S.

Report in regard to the adequacy of bonus —allotment of Allie Daney. January 24, 1914.

With reference to the adequacy of bonus upon the following oil and gas mining lease No. 27965, Allie Daney, a minor, by A. N. Thomas, guardian, Talihina, Oklahoma, to T. H. Dunn and Robert Gillam, Ardmore, Oklahoma, covering the

S2 NW SW and the W2 SW SW of section 4, Township 4S., Range 3W.,

dated August 19, 1913, forty acres, bonus $70.00, I beg leave to report that upon an investigation of the bonus values in this particular district upon the date of execution of this lease, as determined by the presumed capacity of a well brought in upon the Apple-Franklin land in the

SE4 NW NE of section 8-4-3,

August 7, 1913, I find varying sums paid for acreage ranging from $1.00 to as high as $10.00 per acre.

Taking into consideration all the facts, I am of the opinion that a bonus of $70.00 upon August 19, 1913, was inadequate. The present stage of development on tracts adjoining this lease calls for prompt drilling upon the same in order to properly protect the interest of said minor. I therefore advise that it is to the best interests of the minor that in lieu of further cash bonus, there should be required a bonus

consideration in the total sum of $2,000.00 to be taken out of the first oil produced from this lease, said sum to be paid in monthly installments at the rate of 25 per cent of the gross monthly runs, exclusive of the royalty interest, until the entire amount is remitted to the United Sates Indian Agent, to the credit of said minor, and I so recommend.

United States Oil Inspector."

Superintendent Kelsey in his letter of January 31, 1914, to the Indian Commissioner (Rec., pp. 106-109) states:

"On January 24, 1914, the United States Oil Inspector reported that the bonus of $70.00 paid by Dunn & Gillam was inadequate, and advised that it is to the best interests of the minor that in lieu of an additional cash bonus to be paid at this time, the lessees be required to pay a further bonus of $2000.00, to be taken out of the proceeds of the sale of the first oil produced, and to be paid in monthly installments at the rate of 25% of the gross monthly runs exclusive of royalty interest of 12½ per cent recited in the lease."

The Court of Appeals was correct in stating that the plaintiff had fared very well. She got the $2,070 00 bonus and $45,000.00 in addition. Appellant alleges in the 9th paragraph of its bill (Rec., p. 9) that "a much more valuable lease could have been procured for the use and benefit of said Allie Daney, and that one responsible oil operator then stood ready and willing to pay $10,000.00 by way of

bonus for an oil and gas lease on the lands in paragraph No. 1 described." That alleged responsible oil operator did not appear as a witness on the trial to give testimony as to value on Aug. 18, 1913, or any other day.

Omitting the $12,500.00 attorney fee paid the Assistant to the Attorney General, the $45,000.00 plus the $2,070.00 cash bonus, makes $47,070.00—a sum almost five times the amount appellant alleges could have been received for the lease in August, 1913. Appellant contends that the lease in January, 1914, was worth $16,000.00 to $20,000.00, and yet, taking January as the date for determining the value, it appears that Allie Daney has received almost three times the value of the lease in January, 1914. So she has fared very well. The Government never offered to pay back the cash bonus but kept it all through this litigation and this reminds us of the remarks of Judge ADAMS, speaking for the Eighth Circuit Court of Appeals in *Burnes* v. *Burnes*, 137 Fed. 800, as follows:

> "*Nor can he retain the fruits of a bad bargain and maintain a suit for enough more to make it a good one.* The four children of Daniel still keep the 177 shares of the stock of the Burnes estate, which were worth $115,000 in 1889, and which are now, with the 375 shares returned to the corporation and retired, worth $1,100,000, and ask a court of equity to *sweeten their trade by transferring to them other shares worth many hundred thousand dollars more.*

They purchased the 177 shares, now worth $1,100,000, with property worth no more than $275,000 in 1889. Their retention of the fruits of their bargain through all these years is alike fatal to a claim for the rescission of their agreement and *to their prayer to the chancellor to make for them a better bargain. McLean* v. *Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. ed. 804; *The Earnest M. Munn*, 13 C. C. A. 510, 511, 66 Fed. 356, 357; *Grymes* v. *Sanders*, 93 U. S. 55, 62, 23 L. ed. 798; *Breyfogle* v. *Walsh*, 80 Fed. 172, 176, 177, 25 C. C. A. 357, 362."

WE THEREFORE RESPECTFULLY SUBMIT:

(1) That Thomas was not guardian and that obtaining a lease from him in no way injured Allie Daney.

(2) That Dunn and Gillam did not occupy a fiduciary relationship to Allie Daney at any time, and can not be made to account for any profit they made by virtue of the spurious lease executed by a counterfeit guardian.

(3) That, assuming without conceding, Thomas was the guardian, the appellant has affirmed the lease by the compromise and can not prosecute the suit against one or two stockholders especially in view of the compromise negotiated by appellant with the corporation, under which compromise agreement the corporation used its funds for the special preferential benefit of certain stockholders

to the exclusion of other stockholders—a thing illegal and fraudulent.

We therefore respectfully submit that the Government's appeal should either be dismissed or the judgment of the Court of Appeals affirmed.

Respectfully submitted,

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